Petition

Office · reme Court, U.S.
FILED
DEC 28 1981
ALEXANDER L. STEVAS,
CLERK

81-1180

No.

In the Supreme Court of the United States

OCTOBER TERM, 1981

G.R. DICKERSON, DIRECTOR, BUREAU OF ALCOHOL, TOBACCO AND FIREARMS, PETITIONER

v.

NEW BANNER INSTITUTE, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REX E. LEE
Solicitor General

J. PAUL MCGRATH
Assistant Attorney General

ELINOR HADLEY STILLMAN
Assistant to the Solicitor General

DOUGLAS LETTER
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether firearms disabilities imposed by provisions of the Gun Control Act, 18 U.S.C. 922(g) and (h), apply to a person who was convicted of a state offense punishable by imprisonment for a term exceeding one year but whose conviction was expunged under state law following successful probation.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statutes involved	2
Statement	5
Reasons for granting the petition	10
Conclusion	21
Appendix A	1a
Appendix B	11a
Appendix C	12a
Appendix D	13a
Appendix E	21a
Appendix F	23a
Appendix G	41a

TABLE OF AUTHORITIES

Cases:

Barrett v. *United States*, 423 U.S. 212	12
Boykin v. *Alabama*, 395 U.S. 238	12
Gideon v. *Wainwright*, 372 U.S. 335	18
Gonzalez de Lara v. *United States*, 439 F.2d 1316	16
Huddleston v. *United States*, 415 U.S. 814	11, 12
Iowa Beer and Liquor Control Department v. *McBlain*, 263 N.W.2d 226	20
Jerome v. *United States*, 318 U.S. 101	18
Lewis v. *United States*, 445 U.S. 55	10, 17, 18, 19
NLRB v. *Natural Gas Utility District*, 402 U.S. 600	18
Patt v. *Nevada State Board of Accountancy*, 93 Nev. 548, 571 P.2d 105	20
Rzeznik v. *Chief of Police of Southampton*, 374 Mass. 475, 373 N.E.2d 1128	20

Cases—Continued Page

Scarborough v. *United States*, 431 U.S. 563 15
Thrall v. *Wolfe*, 503 F.2d 313, cert. denied, 420 U.S. 972 ..... 17, 19
United States v. *Arrington*, 618 F.2d 1119 ..... 17, 18
United States v. *Benson*, 605 F.2d 1093 12
United States v. *Bergeman*, 592 F.2d 533 ..... 16, 19
United States v. *Fryer*, 545 F.2d 11 17
United States v. *Kelly*, 519 F.2d 794, cert. denied, 423 F.2d 926 17
United States v. *Lehmann*, 613 F.2d 130 ..... 16, 18
United States v. *Nord*, 586 F.2d 1288 16
United States v. *Padia*, 584 F.2d 85 ..... 16, 18
United States v. *Purgason*, 565 F.2d 1279 17
United States v. *Stober*, 604 F.2d 1274 12

Statutes and regulations:

Act of June 30, 1938, ch. 850, 52 Stat. 1251 13
Federal Firearms Act, 15 U.S.C. (1964 ed.) 901 *et seq.*:
15 U.S.C. (1964 ed.) 902(e) 13
15 U.S.C. (1964 ed.) 902(f) 13
Federal Firearms Act Amendment of 1961, Pub. L. No. 87-342, 75 Stat. 757 13
Federal Firearms Act Amendment of 1965, Pub. L. No. 89-184, 79 Stat. 788, 15 U.S.C. (1964 ed., Supp. I) 910 14
Federal Youth Corrections Act, 18 U.S.C. 5005 *et seq.* 9-10, 17
Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 197, amended by the Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1213:
Title IV, 18 U.S.C. 921 *et seq.* 11
18 U.S.C. 921(a) 2
18 U.S.C. 921(a)(20) 2, 15
18 U.S.C. 922 11
18 U.S.C. 922(a) 6

Statutes and regulation—Continued Page

18 U.S.C. 922(d)(1) 21
18 U.S.C. 922(g) 2, 5, 6, 8-9, 11, 12
18 U.S.C. 922(g)(1) 2, 21
18 U.S.C. 922(h) 2, 5, 6, 8-9, 11, 12, 16, 21
18 U.S.C. 922(h)(1) 2-3
18 U.S.C. 923 ..... 3, 10
18 U.S.C. 923(a) 3, 6
18 U.S.C. 923(d)(1) 3
18 U.S.C. 923(d)(1)(B) 3, 6, 8, 9
18 U.S.C. 923(e) 3, 7
18 U.S.C. 923(f)(1) 7
18 U.S.C. 923(f)(2) 7
18 U.S.C. 923(f)(3) 9
18 U.S.C. 924(a) 6, 8
18 U.S.C. 925(c) 6, 13, 14, 15
18 U.S.C. 927 19
Title VII, 18 U.S.C. App. 1201 *et seq.* 13, 17, 18
18 U.S.C. App. 1202(a)(1) 18, 19
18 U.S.C. App. 1203(2) 14, 19
Alaska Stat. § 12.55.085 (1980) 20
Ark. Stat. Ann. § 43-2344 (1977 Repl.) 20
Fla. Stat. Ann. § 948.01 (West 1973 & Cum. Supp. 1981) 20
Iowa Code (1975):
§ 789A 16
§ 789A.1 ..... 4-5, 6
§ 789A.1.g-h 20
§ 789A.6 ..... 5, 7
Iowa Code (1981):
§ 907.3 *et seq.* 15
§ 907.3.1.*c* 15
§ 907.3.1.*d* 15
N.H. Rev. Stat. Ann. § 651:5 (1974) 20
N.M. Stat. Ann. § 31-20-9 (Cum. Supp. 1980) 20
Nev. Rev. Stat. § 176.225 (1979) 20
27 C.F.R. 178.73 7

Miscellaneous: **Page**

H.R. Rep. No. 2663, 75th Cong., 3d Sess. (1938).. 13
S. Rep. No. 82, 75th Cong., 1st Sess. (1937) 13
S. Rep. No. 364, 87th Cong., 1st Sess. (1961) 13
S. Rep. No. 666, 89th Cong., 1st Sess. (1965) 14
S. Rep. No. 997, 74th Cong., 1st Sess. (1935) 13
S. Rep. No. 1097, 90th Cong., 2d Sess. (1968)..13, 14, 19
S. Rep. No. 1501, 90th Cong., 2d Sess. (1968) 11-12

In the Supreme Court of the United States

OCTOBER TERM, 1981

No.

G.R. DICKERSON, DIRECTOR, BUREAU OF ALCOHOL, TOBACCO AND FIREARMS, PETITIONER

v.

NEW BANNER INSTITUTE, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Solicitor General, on behalf of G.R. Dickerson, the Director of the Bureau of Alcohol, Tobacco and Firearms, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-10a) is reported at 649 F.2d 216. The opinion of the district court (App. D, *infra*, 13a-20a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 6, 1981 (App. B, *infra*, 11a) and a timely petition for rehearing was denied on August 25, 1981 (App. C, *infra*, 12a). On November 9, 1981,

the Chief Justice extended the time in which to file a petition for certiorari to and including December 23, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

Title IV of the Omnibus Crime Control and Safe Streets Act of 1968, as amended by the Gun Control Act of 1968, 18 U.S.C. 921 *et seq.*, provides in pertinent part:

18 U.S.C. 921:

(a) As used in this chaper—

* * * * *

(20) The term "crime punishable by imprisonment for a term exceeding one year" shall not include (A) any Federal or State offenses pertaining to antitrust violations, unfair trade practices, restraints of trade, or other similar offenses relating to the regulation of business practices as the Secretary may by regulation designate, or (B) any State offense (other than one involving a firearm or explosive) classified by the laws of the State as a misdemeanor and punishable by a term of imprisonment of two years or less.

18 U.S.C. 922:

* * * * *

(g) It shall be unlawful for any person—

(1) who is under indictment for, or who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year * * * to ship or transport any firearm or ammunition in interstate or foreign commerce.

* * * * *

(h) It shall be unlawful for any person—

(1) who is under indictment for, or who has been convicted in any court of, a crime punish-

able by imprisonment for a term exceeding one year * * * to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

18 U.S.C. 923:

(a) No person shall engage in business as a firearms or ammunition importer, manufacturer, or dealer until he has filed an application with, and received a license to do so from, the Secretary. The application shall be in such form and contain such information as the Secretary shall by regulation prescribe.

* * * * *

(d) (1) Any application submitted under subsection (a) or (b) of this section shall be approved if—

* * * * *

(B) the applicant (including, in the case of a corporation, partnership, or association, any individual possessing, directly or indirectly, the power to direct or cause the direction of the management and policies of the corporation, partnership, or association) is not prohibited from transporting, shipping, or receiving firearms or ammunition in interstate or foreign commerce under section 922(g) and (h) of this chapter.

* * * * *

(e) The Secretary may, after notice and opportunity for hearing, revoke any license issued under this section if the holder of such license has violated any provision of this chapter or any rule or regulation prescribed by the Secretary under this chapter. The Secretary's action under this subsection may be reviewed only as provided in subsection (f) of this section.

Iowa Code § 789A.1 (1975) provides in pertinent part:

> *789A.1 Deferred judgment or suspended sentence—probation.* The trial court may, upon a plea of guilty, verdict of guilty, or a special verdict upon which a judgment of conviction may be rendered, exercise either of the options contained in subsections 1 and 2. However, this section shall not apply to the crimes of treason, murder, or violation of section 204.401, subsection 1 or 2, to which section 204.409, subsection 2 is not applicable and which is not proved to be an accommodation offense under section 204.410.
>
> 1. With the consent of the defendant, the court may defer judgment and place the defendant on probation upon such terms and conditions as it may require. Upon fulfillment of the terms of probation the defendant shall be discharged without entry of judgment. Upon violation of the terms, the court may enter an adjudication of guilt and proceed as otherwise provided.
>
> * * * * *
>
> Any deferment of judgment under this subsection shall be promptly reported to the supreme court administrator who shall maintain a permanent record thereof including the name of the defendant, the district court docket number, the nature of the offense, and the date of the deferment. Before granting deferment in any case, the court shall request of the supreme court administrator a search of the deferred judgment docket and shall consider any prior record of a deferment of judgment against the defendant. The permanent record provided for in this subsection shall constitute a confidential record exempted from public access under section 68A.7 and shall be available only to justices of the

supreme court, district judges, district associate judges, and judicial magistrates requesting information pursuant to this subsection.

Iowa Code § 789A.6 (1975) provides:

789A.6 Discharge from probation. At any time that the court determines that the purposes of probation have been fulfilled, the court may order the discharge of any person from probation. At the expiration of the period of probation, in cases where the court fixes the term of probation, the court shall order the discharge of such person from probation, and the court shall forward to the governor a recommendation for or against restoration of citizenship rights to such person. A person who has been discharged from probation shall no longer be held to answer for his offense. Upon discharge from probation, if judgment has been deferred under section 789A.1, the court's criminal record with reference to the deferred judgment shall be expunged. The record maintained by the supreme court administrator required by section 789A.1 shall not be expunged. The court's record shall never be expunged in any other circumstances except as provided in section 602.15.

STATEMENT

1. Under Title IV of the Omnibus Crime Control and Safe Streets Act of 1968, amended by the Gun Control Act of 1968, 18 U.S.C. 921 *et seq.* (hereinafter "Title IV" or "the Gun Control Act"), it is unlawful for any person under indictment for, or convicted of, a crime punishable by imprisonment for a term exceeding one year to ship, transport, or receive any firearm or ammunition in interstate commerce. 18 U.S.C. 922(g) and (h). The Act

also makes it unlawful to engage in the business of importing, manufacturing, or dealing in firearms without a license from the Secretary of the Treasury. 18 U.S.C. 922(a), 923(a). Grounds for denying such licenses include the circumstance that the applicant is barred by 18 U.S.C. 922(g) and (h) from shipping, transporting, and receiving firearms or—where the applicant is a corporation, partnership, or association—that an individual possessing power to direct policies of that entity is subject to the disabilities of Section 922(g) and (h). 18 U.S.C. 923(d)(1)(B).

In addition, the Act makes it a crime to violate any provisions of the chapter on firearms, or to make a willful misrepresentation with respect to information required under that chapter. 18 U.S.C. 924(a). Finally, the Act permits certain persons convicted of crimes punishable by more than one year in prison to apply to the Secretary of the Treasury for relief from disabilities imposed by federal firearms laws. 18 U.S.C. 925(c).

2. In September 1974, David Kennison (then Director, Chairman of the Board, and stockholder of respondent New Banner Institute, Inc.) was arrested in Iowa and charged with kidnapping his wife, who had left him (App. A, *infra*, 2a; App. G, *infra*, 42a, 45a). The kidnapping charge was dropped, and Kennison pled guilty in the District Court of Iowa in and for Des Moines County to the crime of carrying a concealed weapon, which made him liable for a maximum prison term of five years (App. A, *infra*, 2a). Pursuant to Iowa Code § 789A.1 (1975), the Iowa state court accepted Kennison's guilty plea, deferred entry of judgment against him, and placed him on probation (App. A, *infra*, 2a). Kennison re-

turned to his residence in South Carolina, where he successfully served his probation term. In February 1976, the Iowa court then discharged Kennison under Iowa Code § 789A.6 (1975) without entry of judgment, and expunged his record (App. A, *infra*, 2a).

In May 1976, respondent New Banner filed three applications with the Bureau of Alcohol, Tobacco and Firearms (an office within the Department of the Treasury), pursuant to the Gun Control Act of 1968, for licenses as a dealer in firearms and ammunition, a manufacturer of ammunition, and a collector of curios and relics. In answer to an application question asking whether any person listed as a "responsible person," as defined in the statute, had been convicted of a crime punishable by a prison term exceeding one year, respondent listed Kennison as a responsible person, but did not report his Iowa conviction (App. A, *infra*, 2a). Based on the information given in the applications, the Bureau issued the licenses (*id.* at 3a).

When the Bureau subsequently learned of Kennison's conviction in Iowa on the concealed weapon charge, it sent respondent Notices of Contemplated Revocation of Licenses pursuant to 18 U.S.C. 923(e) and (f)(1), and 27 C.F.R. 178.73 (App. A, *infra*, 4a). Following an informal hearing, the Bureau's Regional Regulatory Administrator issued revocation notices (*ibid.*). Respondent requested and received in September 1977, a formal hearing before an administrative law judge pursuant to 18 U.S.C. 923(f)(2). At the hearing, both the Bureau and respondent presented evidence and legal argument regarding the status of Kennison's conviction (App. A, *infra*, 4a).[1] The Bureau contended that respond-

[1] As evidence of Kennison's conviction, the Bureau introduced an order of the Iowa court noting that Kennison had

ent's licenses should be revoked either because it had failed to reveal Kennison's felony conviction, in violation of 18 U.S.C. 924(a), or because it was not entitled to licenses under 18 U.S.C. 923(d)(1)(B) (App. A, *infra*, 4a).

The administrative law judge issued a decision recommending against revocation (App. G, *infra*, 41a-58a). He concluded that the licenses could not be revoked without proof of a willful misrepresentation by respondent; and he found that willfulness had not been shown because respondent's representatives had a good faith belief that Kennison was not convicted within the meaning of the federal statute (*id.* at 47a, 50a-52a, 57a). The administrative law judge also concluded that the Bureau could not base the revocations on a violation of Section 923(d)(1)(B) of the Act, because respondent had not been apprised of a possible revocation on that ground (App. G, *infra*, 52a).

On administrative review, the Bureau Director agreed with the administrative law judge that no willful misrepresentation in violation of 18 U.S.C. 924(a) had been shown (App. F, *infra*, 37a). He concluded, however, that respondent's licenses should be revoked on the ground that respondent was ineligible under 923(d)(1)(B) to receive them, and thus was ineligible to maintain them (App. F, *infra*, 37a-40a). Specifically, the Director found that Kennison had been convicted in Iowa of an offense that brought him within the prohibitions of 18 U.S.C.

---

entered a plea of guilty to the concealed weapon charge and that he had agreed to probation under the deferred judgment procedure (Gov't Exh. 13). In addition, Kennison testified that he had entered the guilty plea (Tr. of Hearing before ALJ at P.23).

922(g) and (h) (App. F, *infra*, 31a-34a) and that Kennison possessed power to direct the management and policies of respondent (*id.* at 37a-38a). The Director rejected the administrative law judge's conclusion that respondent had had no notice of a possible revocation under Section 923(d)(1)(B) (App. F, *infra*, 27a-30a). Accordingly, the Director ordered issuance of Final Notices of Revocation (*id.* at 40a).

3. Respondent sought review of the Bureau Director's decision in the United States District Court for the District of South Carolina under 18 U.S.C. 923(f)(3). The district court examined the administrative record and granted summary judgment to the Bureau Director, thereby sustaining the license revocations (App. D, *infra*, 13a-20a). The district court rejected respondent's due process argument, finding that respondent had received ample notice of both the issue concerning Kennison's conviction and the issue of his role as a responsible official of respondent within the meaning of 18 U.S.C. 923(d)(1)(B) (App. D, *infra*, 16a-19a). The court further found that the record supported the conclusion that Kennison did have management control of respondent, and that respondent was therefore ineligible for a license under Section 923(d)(1)(B) (App. D, *infra*, 15a-16a, 20a).

4. The court of appeals reversed (App. A, *infra*, 1a-10a), concluding that although, for purposes of the Gun Control Act, Kennison had been convicted of an offense triggering firearms disabilities, the fact that his conviction had been expunged under the Iowa deferred judgment procedure meant that it could not serve as a predicate for a Gun Control Act violation or license revocation.

The court relied on several appellate decisions holding that convictions expunged under the Federal

Youth Corrections Act, 18 U.S.C. 5005 *et seq.*, do not constitute convictions for Gun Control Act purposes (App. A, *infra*, 7a-8a), although it acknowledged that the Fifth, Eighth, and Ninth Circuits had held otherwise with respect to expunctions under state statutes (*ibid.*). The court of appeals also relied on this Court's statement in *Lewis* v. *United States*, 445 U.S. 55, 61 n.5 (1980), that a firearms disability may be removed " 'when the conviction upon which that status depends has been vacated' " (App. A, *infra*, 9a). The court further reasoned that it would be anomalous for the Gun Control Act to use state law to trigger the Act's disability provisions (by permitting the length of the maximum allowable sentence to determine the applicability of those provisions), but not to credit expunctions under state law (*id.* at 9a-10a). Accordingly, the court remanded the case to the district court with instructions to vacate the Bureau's revocation of respondent's licenses (*id.* at 10a).[2]

REASONS FOR GRANTING THE PETITION

This case presents an important question affecting the application of the federal firearms laws to persons

---

[2] Because of its reversal on this ground, the court of appeals found it unnecessary to consider respondent's other arguments (App. A, *infra*, 5a). Those arguments were: (1) that the district court erred in finding that Kennison possessed power to direct the management and policies of respondent; (2) that respondent qualified for a license under 18 U.S.C. 923 notwithstanding Kennison's role in its management; (3) that respondent was not accorded a full and fair hearing on the grounds for revocation; and (4) that the Gun Control Act, on its face, violates various constitutional provisions. The constitutional challenges had not been raised in the district court.

prosecuted under deferred judgment statutes that, in varying forms, exist in many states across the country. The holding of the court of appeals that the expunction of Kennison's conviction under the Iowa statute relieved him of the firearms disabilities imposed by 18 U.S.C. 922(g) and (h) undermines the broad purposes of the Gun Control Act and interferes with a comprehensive federal scheme that confides to the Secretary of the Treasury the decision whether Section 922 disabilities should be lifted. It also conflicts with decisions in at least three other circuits. Finally, that division in the circuits, together with the difficulties of applying the standard of the court below (which would give federal effect to state expunctions deemed "unconditional and absolute" (App. A, *infra*, 10a)), make it difficult, if not impossible, for the Bureau of Alcohol, Tobacco and Firearms to achieve predictable and uniform enforcement of the federal firearms laws.

1. In previous cases concerning Title IV of the Omnibus Crime Control and Safe Streets Act of 1968, as amended by the Gun Control Act of 1968, 18 U.S.C. 921 *et seq.*, this Court has acknowledged the broad prophylactic purpose of the statute, noting:

> When Congress enacted [18 U.S.C. 921 *et seq.*], it was concerned with the widespread traffic in firearms and with their general availability to those whose possession thereof was contrary to the public interest. * * * The principal purpose of the federal gun control legislation, therefore, was to curb crime by keeping "firearms out of the hands of those not legally entitled to possess them because of age, criminal background, or incompetency."

Huddleston v. *United States*, 415 U.S. 814, 824 (1974), quoting S. Rep. No. 1501, 90th Cong., 2d

Sess. 22 (1968). Accord, *Barrett* v. *United States*, 423 U.S. 212, 220 (1976). As this Court has also observed, "[t]he principal agent of federal enforcement is the dealer." *Huddleston* v. *United States*, *supra*, 415 U.S. at 824.

The Act's purposes would be frustrated by the decision of the court below, which will require the Secretary of the Treasury to grant firearms dealer and manufacturer licenses to organizations directed by individuals convicted of serious criminal offenses (or to such individuals themselves) whenever the conviction in question has been expunged by a state deferred judgment or expunction statute in a manner that appears to make the expunction "unconditional and absolute" for purposes of state law.[3] There is no support in the language or legislative history of 18 U.S.C. 922(g) and (h) for the proposition that convictions expunged under state deferred judgment procedures are not included in the prohibition.[4] Moreover, the

---

[3] We believe that the court of appeals correctly determined that Kennison was originally convicted in Iowa by virtue of his entry of a guilty plea to the concealed weapon charge (App. A, *infra*, 6a); but we note that the circuits are in conflict on the question of what constitutes a conviction, as well as on the question whether expunged convictions may serve as the predicates for federal firearms offenses. Compare *United States* v. *Benson*, 605 F.2d 1093 (9th Cir. 1979) (guilty plea followed by sentence of probation is a conviction), with *United States* v. *Stober*, 604 F.2d 1274 (10th Cir. 1979) (en banc) (guilty plea and probation under deferred judgment statute *not* a conviction). See also *Boykin* v. *Alabama*, 395 U.S. 238, 242 (1969) (stating, in a different context, that a guilty plea "is more than a confession * * *; it is itself a conviction").

[4] The sections imposing firearms disabilities on, *inter alia*, persons convicted of offenses punishable by imprisonment for a term exceeding one year were derived from the Federal

decision below fails to take account of the fact that state expunction procedures, like the one involved here, generally represent the equivalent of a pardon for the offense and in no way represent a determination that the person was not properly found guilty of the offense charged.

The decision below thus permits state courts acting pursuant to state expunction statutes effectively to make a determination that the Gun Control Act confides exclusively to the Secretary of the Treasury or his designee, who must apply specified statutory criteria.[5] Under 18 U.S.C. 925(c), a person "con-

---

Firearms Act (15 U.S.C. (1964 ed.) 902(e) and (f)). See S. Rep. No. 1097, 90th Cong., 2d Sess. 115 (1968). The Federal Firearms Act provisions, originally enacted in 1938 (ch. 850, 52 Stat. 1251), were amended in 1961 by changing the definition of the covered offenses from "crime of violence" to "crime punishable by imprisonment for a term exceeding one year" (Pub. L. No. 87-342, 75 Stat. 757). The legislative history of these provisions and the 1961 amendment indicate no intent to create exceptions for state expungement procedures. See S. Rep. No. 997, 74th Cong., 1st Sess. (1935); S. Rep. No. 82, 75th Cong., 1st Sess. (1937); H.R. Rep. No. 2663, 75th Cong., 3d Sess. (1938); S. Rep. No. 364, 87th Cong., 1st Sess. (1961). In expanding the covered offenses beyond crimes of violence, Congress intended to give federal authorities "additional jurisdiction to assist local authorities in the common assault against crime"; and it chose the new punishment-oriented classification because that would include "any crime which measures up to the Federal standard of a felony; that is, any crime punishable by imprisonment for a term exceeding 1 year." S. Rep. No. 364, *supra*, at 2.

[5] With respect to the disabilities imposed by Title VII of the Omnibus Crime Control and Safe Streets Act of 1968, as amended by the Gun Control Act, 18 U.S.C. App. 1201 *et seq.* (governing unlawful possession or receipt of firearms), relief may be obtained through a pardon from the President of the United States or chief executive of a State that *ex-*

victed of a crime punishable by imprisonment for a term exceeding one year (other than a crime involving the use of a firearm * * *) may make application to the Secretary for relief from the disabilities imposed by Federal laws with respect to the acquisition, receipt, transfer, shipment, or possession of firearms and incurred by reason of such conviction * * *."[6] The Secretary is permitted to grant relief if he concludes "that the circumstances regarding the conviction, and the applicant's record and reputation, are such that the applicant will not be likely to act in a manner dangerous to public safety and that the granting of the relief would not be contrary to the public interest." 18 U.S.C. 925(c). The Iowa deferred judgment statute provides for no such careful consideration of whether it is in the public interest to entrust firearms to an individual who pleads guilty to an offense and successfully completes a probationary period. Kennison never applied for relief under 18 U.S.C. 925(c),[7] and the court of ap-

---

pressly authorizes the individual in question to receive, possess, or transport in commerce a firearm. 18 U.S.C. App. 1203(2). A benefit conferred pursuant to a state deferred judgment or expunction statute plainly does not meet these conditions.

[6] Section 925(c) is derived from a 1965 amendment to the Federal Firearms Act, Pub. L. No. 89-184, 79 Stat. 788, 15 U.S.C. (1964 ed., Supp. I) 910. See S. Rep. No. 1097, 90th Cong., 2d Sess. 118 (1968). The Senate Report on the 1965 amendment (which incorporates portions of a House report) appears to assume that no other means of relief from federal firearms disabilities were available. S. Rep. No. 666, 89th Cong., 1st Sess. 2 (1965).

[7] Were Kennison to apply for such relief, the Secretary would undertake an investigation of the circumstances of his offense. If in fact the weapons violation did not involve actual *use* of the firearms (see 18 U.S.C. 925(c)), the Secretary

peals has now made it unnecessary for him to do so, having concluded that the Iowa state court could relieve him of the federal consequences of his offense, whether or not the considerations for invoking the state deferred judgment procedure are the same as those that guide the Secretary's decision under Section 925(c).[8]

In sum, the court of appeals' interpretation of Title IV—which this Court has recognized as "a carefully constructed package of gun control legislation" (*Scarborough* v. *United States*, 431 U.S. 563, 570 (1977))—improperly makes its application dependent on the vagaries of state law, undermines its

---

would not be barred by the statute from granting relief from the disabilities.

[8] The serious threat that the holding of the court below poses to the purposes of the Gun Control Act can be appreciated by considering possible outcomes under this decision in light of the Iowa deferred judgment procedure in its present form. Iowa Code § 907.3 *et seq.* (1981). The procedure is unavailable to an individual who "[p]rior to the commission of the offense * * * had been granted a deferred judgment or similar relief, two or more times anywhere in the United States" (§ 907.3.1.*c*) or who had been granted "a deferred judgment or similar relief in a felony prosecution anywhere in the United States within the preceding five years * * *" (§ 907.3.1.*d*). It *could* be available, however, to an individual who pled guilty to a firearms offense and who had previously received a deferred judgment following a plea to a misdemeanor firearms offense. Under the court of appeals' theory, neither plea could serve as a basis for a federal gun law violation, notwithstanding the fact that Congress specifically chose to treat offenses involving firearms more severely than other offenses. (Under 18 U.S.C. 921(a)(20), conviction of a State offense "classified by the laws of the State as a misdemeanor and punishable by a term of imprisonment of two years or less" will not trigger the statute's disabilities *unless* the offense is one "involving a firearm or explosive.")

central purpose, and disregards the significance of the careful distinctions and specific relief mechanisms that it contains.

2. Courts of appeals in other circuits have concluded, contrary to the court below, that the application of the federal firearms laws should not depend on the way in which a state chooses to treat an individual convicted of an offense that comes within the category of offenses expressly made predicates for federal firearms disabilities.

In *United States* v. *Bergeman*, 592 F.2d 533 (9th Cir. 1979), the court of appeals thoroughly analyzed the question decided below in the context of an Idaho statute quite similar to Iowa Code § 789A (1975). Taking note of the purpose of the Gun Control Act and the statute's own relief provision, the Ninth Circuit concluded that expunction of a felony conviction under Idaho law did not remove the Act's disabilities. The Fifth Circuit reached an identical result in a case involving a Texas probation statute under which a conviction could be set aside as a reward for the defendant's good behavior during probation. *United States* v. *Padia*, 584 F.2d 85 (1978). As the court of appeals there explained (*id.* at 86, quoting *Gonzalez de Lara* v. *United States*, 439 F.2d 1316, 1318 (5th Cir. 1971)): "'The manner in which a Texas court chooses to deal with a party subsequent to his conviction is simply not of controlling importance, where, as here, 'a function of federal, not state law * * * is concerned.'" The Fifth Circuit reiterated this proposition in *United States* v. *Lehmann*, 613 F.2d 130 (1980). Finally, in *United States* v. *Nord*, 586 F.2d 1288 (1978), the Eighth Circuit upheld a Gun Control Act conviction for receipt of firearms by a felon (18 U.S.C. 922(h)) even though the defendant's earlier conviction had been

reduced to a misdemeanor and his civil rights restored under state law. See also *United States* v. *Kelly*, 519 F.2d 794 (8th Cir.), cert. denied, 423 U.S. 926 (1975) (state restoration of civil rights does not remove conviction for purposes of prosecution under 18 U.S.C. App. 1201 *et seq.*); *Thrall* v. *Wolfe*, 503 F.2d 313 (7th Cir. 1974), cert. denied, 420 U.S. 972 (1975)) (denial of license affirmed because state pardon held not to override Title IV disabilities).

3. The court below acknowledged (App. A, *infra*, 7a-9a) that decisions of the Fifth, Eighth, and Ninth Circuits were contrary to its view. It chose to rely instead on decisions concerning expunction of convictions under the Federal Youth Corrections Act, 18 U.S.C. 5005 *et seq.*,[9] and on its reading of dictum in this Court's decision in *Lewis* v. *United States*, 445 U.S. 55 (1980).

a. The rationale of the opinions in the Youth Corrections Act cases cited by the court of appeals is, to be sure, to some degree inconsistent with the decisions, cited above, that decline to give federal effect to state expunction procedures. They do not, of course, eliminate the conflict among the circuits. Moreover, whether or not the decisions concerning the Youth Corrections Act are correct, they are clearly distinguishable from the ones concerning state procedures. The courts were there construing two federal statutes, which they were obligated to harmonize to the greatest degree possible. The principle that, in the absence of a clear indication to the contrary, federal statutes are not to be construed as dependent

---

[9] *United States* v. *Arrington*, 618 F.2d 1119 (5th Cir. 1980); *United States* v. *Purgason*, 565 F.2d 1279 (4th Cir. 1977); *United States* v. *Fryer*, 545 F.2d 11 (6th Cir. 1976).

on state law (see *NLRB* v. *Natural Gas Utility District*, 402 U.S. 600, 603 (1971); *Jerome* v. *United States*, 318 U.S. 101, 104 (1943)), therefore, did not affect the courts' construction of the Gun Control Act in relation to the Federal Youth Corrections Act, as it must in cases construing the effect of state statutes on Gun Control Act prosecutions.[10]

b. Contrary to the court of appeals' view (App. A, *infra*, 9a), this Court's decision in *Lewis* v. *United States*, *supra*, does not support the result reached in this case. In *Lewis* the Court considered whether an extant conviction subject to collateral attack on the basis of *Gideon* v. *Wainwright*, 372 U.S. 335 (1963), could nevertheless be used as a predicate for a subsequent conviction under Title VII of the Omnibus Crime Control and Safe Streets Act, 18 U.S.C. App. 1201 *et seq.* The Court noted the sweeping language of the provision at issue (18 U.S.C. App. 1202(a)(1)) and concluded that it was properly construed as making it unlawful for a felon to possess a firearm "until the conviction is vacated or the felon is relieved of his disability by some affirmative action, such as a qualifying pardon or a consent from the Secretary of the Treasury." 445 U.S. at 60-61 (footnote omitted). Read in context, the reference to vacation of a conviction is a reference to an action (such as reversal on appeal or vacation on collateral attack) taken on grounds that the verdict is unsupported or that there was some error in the prosecutorial or guilt-determining process.[11] This is distinct

---

[10] We note that the Fifth Circuit in *United States* v. *Arrington*, *supra*, did not purport to overrule its earlier decisions in *United States* v. *Lehmann*, *supra*, or *United States* v. *Padia*, *supra*.

[11] In a footnote, the Court takes note of a concession, made by government counsel in oral argument, that the language of

from "some affirmative action" that relieves the defendant of "his disability." The treatment accorded Kennison under the Iowa deferred judgment procedure—which simply relieved him of disabilities that would otherwise follow from his guilty plea—is clearly in the latter category rather than the former. And *Lewis* in no way indicates that state expunction procedures constitute an adequate means of removing federal firearms disabilities.[12]

4. The decision below seriously interferes with the congressional aim of achieving a uniform, nationwide approach to what it regarded as a problem of national concern. See S. Rep. No. 1097, 90th Cong., 2d Sess. 28, 76-77 (1968). See also *United States* v. *Bergeman*, *supra*, 592 F.2d at 537.[13] Furthermore, it creates uncertainties for license applicants and seriously complicates the enforcement task of the Bureau of Alcohol, Tobacco, and Firearms.

A survey of state laws concerning post-conviction treatment reveals a bewildering array of approaches. The differences are apparent from the very terms

---

18 U.S.C. App. 1202(a)(1) does not include within its proscription "a person whose predicate conviction in the interim had been finally reversed on appeal and thus no longer was outstanding." 445 U.S. at 61 n.5.

[12] Thus, the Court spoke of a "qualifying pardon" (445 U.S. at 61)—a clear reference to the specific types of federal and state pardons defined in 18 U.S.C. App. 1203(2).

[13] Congress did provide in 18 U.S.C. 927 that it did not intend "to occupy the field" and thereby exclude any state law "on the same subject matter" that does not directly conflict with the federal statute. But as the Seventh Circuit has noted (*Thrall* v. *Wolfe*, *supra*, 503 F.2d at 317), that provision serves merely to avoid preempting state laws "on the same subject matter"—*i.e.*, laws that regulate firearms. A general law concerning treatment of defendants found guilty by plea or verdict is not a law on that subject matter.

used to describe the effect of these laws on the plea or verdict of guilty: *e.g.*, "set[ting] aside the conviction" (Alaska Stat. § 12.55.085 (1980)); "withhold[ing] the adjudication of guilt" (Fla. Stat. Ann. § 948.01 (West 1973 & Cum. Supp. 1981)); "annul[ling] the record of conviction" (N.H. Rev. Stat. Ann. § 651:5 (1974)); expunging the record of conviction (Ark. Stat. Ann. § 43-2344 (1977 Repl.)); "dismiss[ing] criminal charges" (N.M. Stat. Ann. § 31-20-9) (Cum. Supp. 1980)); or granting an "honorable discharge from probation" (Nev. Rev. Stat. § 176.225 (1979)). The statutes vary further as to such factors as the category of offenses and persons covered, the prerequisites for relief, the discretion given to the trial court, and the purposes, if any, for which the plea or verdict of guilt may be used.[14]

Because many state laws are vague concerning their intended effect, interpretation by the state courts is often necessary as to the effect of expunctions in differing contexts for differing purposes. See, *e.g.*, *Patt* v. *Nevada State Board of Accountancy*, 93 Nev. 548, 571 P.2d 105 (1977); *Rzeznik* v. *Chief of Police of Southampton*, 374 Mass. 475, 373 N.E.2d 1128 (1978); *Iowa Beer and Liquor Control Department* v. *McBlain*, 263 N.W.2d 226 (Iowa 1977). Under the Gun Control Act as construed by the court of appeals in this case, it would be necessary for the Bureau, in making its enforcement decisions, to construe a number of differing state laws in order to determine whether individuals found guilty

---

[14] Although the court of appeals stated that the Iowa statute provided for expunction that was "unconditional and absolute" (App. A, *infra*, 10a), it is not the case that the plea and deferral of judgment carried no consequences. For example, those events made Kennison ineligible for deferred judgment treatment in the future. Iowa Code § 789A.1.g-h (1975).

of offenses that come within the plain language of 18 U.S.C. 922(g) and (h) have received "unconditional and absolute" expunctions of their convictions.[15] We do not believe that this is what Congress intended in the broad regulatory scheme that it enacted; but in any event resolution of the issue by this Court is essential to give guidance to the Bureau, to license applicants, and to others affected by the restrictions of the federal firearms laws.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

REX E. LEE
Solicitor General

J. PAUL MCGRATH
Assistant Attorney General

ELINOR HADLEY STILLMAN
Assistant to the Solicitor General

DOUGLAS LETTER
Attorney

DECEMBER 1981

---

[15] The decision poses a problem for gun dealers also, since the Act prohibits a dealer from selling a gun to a person whom he has reasonable cause to believe has been convicted of a crime punishable by a term of imprisonment exceeding one year. 18 U.S.C. 922(d)(1). If the dealer knows that a buyer pled guilty to such an offense but was put on probation under a deferred judgment procedure, or otherwise had his conviction expunged, the dealer may be at a genuine loss to understand whether the sale is lawful.

Appendix

APPENDIX A

No. 80-1141

NEW BANNER INSTITUTE, INC., APPELLANT

versus

G. R. DICKERSON, Director Bureau of Alcohol, Tobacco and Fire Arms, APPELLEE

Appeal from the United States District Court for the District of South Carolina, at Columbia
Robert F. Chapman, District Judge

Argued November 13, 1980 Decided May 6, 1981

Before WINTER, Circuit Judge, FIELD, Senior Circuit Judge and PHILLIPS, Circuit Judge

---

PHILLIPS, Circuit Judge:

On this appeal, New Banner Institute, Inc. (New Banner) challenges the refusal of the district court to set aside the decision of the Director of the Bureau of Alcohol, Tobacco and Firearms (ATF) revoking New Banner's licenses as a dealer in firearms under 18 U.S.C. § 923(e). New Banner was found not entitled to the licenses because David

Kennison, chairman of its board, had been "convicted" in Iowa of a crime that had the effect of preventing him from shipping, transporting or receiving firearms in interstate commerce under section 922(g) and (h). *See id.* § 923(d)(1)(B). We hold, however, that the earlier expunction of Kennison's conviction under Iowa's deferred judgment statute made inappropriate consideration of that conviction as a predicate conviction for purposes of section 922(g) and (h). Accordingly, we reverse the judgment of the district court and remand with instructions.

I

Kennison was arrested in Iowa in September 1974 on a charge of kidnapping, and in January 1975 he pleaded guilty to a charge of carrying a concealed weapon, a crime that under Iowa law permits a sentence of more than one year. *See* Iowa Code § 695.3. Pursuant to Iowa Code § 789A.1, however, the Iowa court deferred judgment and placed Kennison on one year's probation. Upon Kennison's successful completion of his probationary term, the trial court, on February 5, 1976, discharged him without entry of judgment and expunged his record as provided under Iowa Code § 789A.6.

New Banner submitted its applications for three licenses to deal in firearms on May 14, 1976. These applications required that the applicant list all "responsible persons" as defined and asked the question whether any person so listed had been convicted of a crime punishable by imprisonment for a term exceeding one year. Kennison was listed as a responsible person, but his conviction was not reported. This was done upon the advice of counsel, the attorney who had represented Kennison on the Iowa

charge, the Iowa trial judge who had sentenced Kennison, South Carolina officials charged with the regulation of firearms in that state and an official of ATF at its Columbia, South Carolina office. From this advice it was concluded that Kennison's conviction need not be reported because the Iowa case against him had been closed without entry of judgment. The licenses were granted by ATF on the basis of these applications.

In December 1976, however, New Banner received a letter from the ATF Regional Counsel stating that "subsequent investigation" had revealed Kennison's conviction in Iowa on the concealed weapon charge, a crime punishable by imprisonment in excess of one year. The Regional Counsel stated his belief that New Banner's applications were, therefore, false with respect to Kennison's having been convicted. Counsel also remarked that Kennison's conviction justified denial of New Banner's licenses under 18 U.S.C. § 923(d)(1)(B), which provides that ATF may deny a license to a corporation if "any individual possessing, directly or indirectly, the power to direct or cause the direction of the management and policies of the corporation . . . is . . . prohibited from transporting, shipping, or receiving firearms or ammunition in interstate or foreign commerce under section 922(g) and (h) of this chapter." Subsections 922(g) and (h) in turn make it unlawful for any person "convicted" of a "crime punishable by imprisonment for a term exceeding one year" to ship, transport or receive firearms or ammunition in interstate commerce. The Regional Counsel concluded by stating that, since New Banner had been given an opportunity to surrender its licenses and had failed to do so, ATF planned to

seek revocation of those licenses for the reasons stated in the letter under section 923(e).

The Regional Regulatory Administrator of ATF issued Notices of Contemplated Revocation of License to New Banner pursuant to 27 C.F.R. § 178.73. The reason given in these notices for the contemplated revocation was the failure of New Banner to list Kennison in its applications for licenses as a "responsible person" who had been convicted of a crime punishable by imprisonment exceeding one year in violation of 18 U.S.C. § 924(a).

Following an informal hearing and the issuance of Notices of Revocation of License that alleged that "the licensee wilfully violated the provisions of the Gun Control Act of 1968," New Banner requested a formal hearing before an administrative law judge. At this hearing both New Banner and the ATF presented evidence and legal argument on the issue whether Kennison had been "convicted" in Iowa. ATF then contended that New Banner's licenses could be revoked either because it had failed to include Kennison's felony "conviction" in its license applications in violation of section 924(a) or because it was not entitled to a license under section 923(d)(1)(B).

The ALJ, however, rejected both of ATF's contentions, and in his Recommended Decision denied revocation of New Banner's licenses. He found that New Banner had not "willfully" failed to include Kennison's "conviction" in its applications as required by section 924(a) because it "honestly believed" that Kennison had not been "convicted." He further found that ATF could not now base revocation of New Banner's licenses on a violation of section 923(d)(1)(B) because it had never given New Banner "notice" of this charge.

The Director of ATF, however, approved the ALJ's decision only in part. He found that the ALJ had properly denied revocation based on a violation of the section 924(a) application requirements because that section requires a "knowing" failure, which had not been shown. The Director, on the other hand, held that revocation was properly based on a violation of section 923(d)(1)(B). He concluded that, looking at the whole proceeding, New Banner had been given the opportunity to defend and had actually litigated the charge of violation of section 923(d)(1)(B). After a review of the relevant case law, he found that under either federal or Iowa law, Kennison had been "convicted" despite application of the Iowa deferred judgment statute. The Director therefore concluded that Kennison would be prohibited from shipping, transporting or receiving firearms or ammunition under section 922(g) and (h). He then found, based on an examination of the abundant evidence in the record, that Kennison was an individual possessing, directly or indirectly, the power to direct or cause the direction of the management and policies of New Banner. He therefore held that New Banner should have been denied its licenses under section 923(d)(1)(B) and that this violation could serve as the basis for revocation of those licenses under section 923(e). The district court upheld this disposition by the Director.

II

Although New Banner has asserted a number of statutory and constitutional challenges to the Director's revocation of its firearms licenses, we need only address the issue of Kennison's Iowa "conviction" inasmuch as our resolution of that issue is

dispositive of this appeal. *See Hagans* v. *Lavine*, 415 U.S. 528, 543 (1974). The question whether a person has been "convicted" for purposes of the federal firearms law is ultimately one of federal law, regardless of whether the alleged predicate "conviction" resulted from a violation of federal or state law. *See, e.g., United States* v. *Lehmann*, 613 F.2d 130, 135 (5th Cir. 1980); *United States* v. *Benson*, 605 F.2d 1093, 1094-95 (9th Cir. 1979). *Contra United States* v. *Brzoticky*, 588 F.2d 773, 775 (10th Cir. 1978). Applying federal law in this case, Kennison's plea of guilty to the Iowa charge of carrying a concealed weapon must be regarded as a "conviction" because, as the Supreme Court held in *Boykin* v. *Alabama*, 395 U.S. 238, 242 (1969), a "plea of guilty . . . is itself a conviction." *See United States* v. *Benson*, 605 F.2d at 1095. Therefore, it is clear that, at least during the period of Kennison's probation on the Iowa charge, his "conviction" on that charge would have barred him from shipping, transporting or receiving firearms under section 922(g) and (h). *See, e.g., United States* v. *MacGregor*, 617 F.2d 348 (3d Cir. 1980); *Barker* v. *United States*, 579 F.2d 1219, 1226 (10th Cir. 1978).

The Supreme Court, however, has recently recognized that, while "the fact of a felony conviction imposes a firearm disability," that disability may be removed by the vacation of the conviction on appeal or "by some affirmative action, such as a qualifying pardon or a consent from the Secretary of the Treasury." *Lewis* v. *United States*, 445 U.S. 55, 60-61 (1980). Thus, the question is the effect, if any, of the expunction of Kennison's record under Iowa's deferred judgment statute for purposes of the Gun Control Act of 1968.

In *United States* v. *Purgason*, 565 F.2d 1279, 1280 (4th Cir. 1977), we addressed an analogous question in holding that a conviction that had been expunged under the federal Youth Corrections Act had "no further operative effect" and therefore could not be used as the predicate conviction in a prosecution under 18 U.S.C. § 922(h)(1) and 18 U.S.C. App. § 1291(a)(1). In *Purgason* we relied in part on the decision of the Sixth Circuit in *United States* v. *Fryer*, 545 F.2d 11, 13 (6th Cir. 1976), that "the Youth Corrections Act is by legislative design an expunction statute, and that the word 'convicted' in 18 U.S.C. App. § 1202(a)(1) cannot be read to include a conviction expunged from the record by the Youth Corrections Act." *Purgason* and *Fryer*, in turn, were recently cited by the Fifth Circuit in support of its holding that a conviction under the Gun Control Act could not be premised on a conviction that had been expunged under the Youth Corrections Act. *United States* v. *Arrington*, 618 F.2d 1119, 1124 (5th Cir. 1980).

In the present case we are, of course, confronted with the effect of a state expunction statute, which introduces principles of federalism into the calculus. Most of the courts that have considered the question have upheld use of an expunged state conviction as the predicate for conviction under the Gun Control Act. They have reasoned that, because the definition of "convicted" for purposes of the Gun Control Act is a question of federal law, state expunction statutes or state court interpretations of the effects of those statutes are irrelevant to resolution of that question. *See, e.g., United States* v. *Lehmann*, 613 F.2d at 135. In divining federal law, however, these courts have looked only to the provisions of the Gun

Control Act itself, and, finding no express exclusion of expunged conviction in the Act, they have upheld firearms convictions premised on expunged state convictions. *See, e.g., United States* v. *Bergeman*, 592 F.2d 533, 536 (9th Cir. 1979); *United States* v. *Mostad*, 485 F.2d 199, 200-01 (8th Cir. 1973). The ultimate rationale for decision in those cases is, therefore, the failure of Congress specifically to address the use of expunged convictions under the Act—a rationale that would apply to convictions that have been expunged under either state or federal statutes.

This rationale, however, was implicitly rejected by the courts in *Arrington*, *Purgason* and *Fryer*. Moreover, the Tenth Circuit, in considering a prosecution under 18 U.S.C. § 922 that was predicated on a conviction that had been expunged subsequent to the commencement of the federal prosecution, implied that, had the state conviction been expunged prior to commencement of the federal proceeding, it could not have served as the basis for a federal firearms conviction. *United States* v. *Brzoticky*, 588 F.2d at 775. A few months later, the same court stated that, without regard to whether the predicate conviction is a federal or state one, "once one is convicted of a felony he is within the proscription against possession of firearms until that prior conviction is *actually* overturned or expunged." *Barker* v. *United States*, 579 F.2d at 1226 (emphasis in original).

We find the reasoning of the courts in the Youth Corrections Act cases and of the Tenth Circuit in *Brzoticky* and *Barker* to be more persuasive than that followed by the courts that have upheld use of an expunged predicate conviction in a prosecution under the Gun Control Act. There are two cogent justifications for this choice.

First, by holding in *Lewis* that a firearms disability may be removed by vacation of the predicate conviction on appeal, the Supreme Court has recognized that convictions other than those expressly excluded from consideration by the terms of the Gun Control Act may not be used as the predicate for a federal firearms conviction. The *Lewis* Court reviewed "the language Congress chose as consistent with the common-sense notion that a disability based upon one's status as a convicted felon should cease only when the conviction upon which that status depends has been vacated." *Lewis* v. *United States*, 445 U.S. at 61 n.5. We think this "common-sense notion" applies whether the predicate conviction has been vacated by appeal or by unconditional expunction.

Second, while it is undoubtedly true that the construction of the word "convicted" used in the Gun Control Act is a matter of federal law, it is not at all inconsistent with that principle to find that Congress intended that a person whose conviction has been expunged under a state statute not be considered any longer "convicted." At least one court has found that it would be "anomalous" to pin the decision whether a person is a convicted felon at the time of a federal firearms prosecution on whether that person's conviction has been expunged under the law of the state in which he happened to be convicted. *United States* v. *Bergeman*, 592 F.2d at 537. Congress has expressly chosen to rely on state law in the federal firearms legislation, however, by allowing the various states to decide which crimes will carry the possibility of a sentence in excess of one year that is necessary to trigger a federal firearms disability. *See* 18 U.S.C. § 922(g) and (h). Indeed, had Kennison been convicted in his native

South Carolina, where a charge of carrying a concealed weapon does not carry a sentence of greater than one year, rather than Iowa, where the same charge is a felony, he never would have been subjected to a disability. Therefore, we see no anomaly in finding that Congress also intended to rely on state law for one method of removing that disability.

Because an expunction under the Iowa "deferred judgment" statute, like one under the federal Youth Corrections Act, is unconditional and absolute, *see State* v. *Farmer*, 234 N.W.2d 89, 92 (Iowa 1975) (dictum), we find that the rationale used by this court in *Purgason* is equally applicable in this case. Therefore, we hold that, while Kennison was under a firearms disability during the period of his probation on the Iowa charge, the expunction of that charge upon the successful completion of his probation effectively removed that disability. Since the expunction occurred prior to the ATF's attempted revocation of New Banner's licenses, there was no ground for that revocation. Therefore, we reverse the decision of the district court and remand the case to that court with instructions that it vacate the ATF's revocation of New Banner's licenses to deal in firearms.

Reversed and remanded with instructions.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 80-1141

C/A 79-943

NEW BANNER INSTITUTE, INC., APPELLANT

vs.

G. R. DICKERSON, DIRECTOR BUREAU OF ALCOHOL, TOBACCO AND FIRE ARMS, APPELLEE

Appeal from the United States District Court for the District of South Carolina

---

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of South Carolina, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, REVERSED and the case is REMANDED to the United States District Court for the District of South Carolina at Columbia with instructions for further proceedings consistent with the opinion of this Court filed herewith.

/s/ William K. Slate, II
WILLIAM K. SLATE, II
Clerk

Filed May 6, 1981

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 80-1141

NEW BANNER INSTITUTE, INC., APPELLANT

versus

G. R. DICKERSON, DIRECTOR BUREAU OF ALCOHOL, TOBACCO AND FIRE ARMS, APPELLEE

ORDER

The appellee's petition for rehearing and suggestion for rehearing en banc has been submitted to the court. A poll of the court was requested, and the poll of the court on the suggestion for rehearing en banc did not carry.

The panel considered the petition for rehearing and is of the opinion that it should be denied.

It is ADJUDGED and ORDERED that the petition for rehearing and suggestion for rehearing en banc are denied.

Entered at the direction of Judge Phillips for a panel consisting of Judge Winter, Judge Field, and Judge Phillips.

For the Court

/s/ William K. Slate, II
WILLIAM K. SLATE, II
Clerk

Filed Aug. 25, 1981

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

Civil Action No. 79-439

NEW BANNER INSTITUTE, INC., PETITIONER

vs

G. R. DICKERSON, DIRECTOR BUREAU OF ALCOHOL, TOBACCO AND FIREARMS, RESPONDENT

ORDER

Petitioners instituted this action pursuant to the provision of 18 U.S.C. § 923(f)(3), seeking judicial review of the respondent's decision to revoke petitioner's licenses as a dealer in firearms and ammunition, a manufacturer of ammunition, and a collector of curios and relics. Section 923(f)(3) provides that after an examination of the administrative hearing record and any additional evidence submitted by the parties, the Court will enter summary judgment for the respondent if it finds that his decision was "authorized", that is supported by substantial evidence. *McLemore* v. *United States Treasury*, 317 F.Supp. 1077 (N.D.Fla. 1970); *Mayesh* v. *Schultz, et al*, 58 F.R.D. 537 (S.D. Ill. 1973).

Each party has moved for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. The parties concede that there is no

dispute as to any material fact and each side claims that it is entitled to judgment as a matter of law. The parties have filed memoranda in support of their respective motions, and pursuant to § 923(f)(3), respondent has filed a certified copy of the record of the administrative proceedings heretofore conducted in this matter.

A review of the record reveals that respondent's decision to revoke petitioner's Federal firearms licenses reversed an earlier recommended decision by Administrative Law Judge Kenneth Travis, dated November 1, 1977. The question before Judge Travis at the time he issued his recommendation that the licenses not be revoked, was whether or not petitioner had violated 18 U.S.C. § 924(a) by making false statements in its license applications. Petitioner has stated in its application that none of its responsible officials had been convicted of a crime punishable by imprisonment for a term exceeding one year, despite the fact petitioner's Director, Chairman of the Board, and stockholder, Mr. David Kennison, had been convicted of such a crime. Judge Travis found that petitioner had not violated § 924(a) because petitioner had not willfully submitted a false application. He recommended that the petitioner's licenses not be revoked.

Respondent approved that portion of Judge Travis' decision that petitioner had not violated § 924(a). However, he reversed the recommendation that the licenses not be revoked on the grounds that petitioner was not qualified under 18 U.S.C. § 923(d)(1)(B) to receive Federal firearms licenses. This section provides, among other things, that the license application shall be approved if the applicant (including in the case of a corporation, any individual

possessing, directly or indirectly, the power to direct or cause the direction of the management and policies of the corporation) is not prohibited from transporting, shipping or receiving firearms or ammunition in interstate or foreign commerce under 18 U.S.C. §§ 922(g) and (h). Sections 922(g) and (h) provide *inter alia*, that it shall be unlawful for any person who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year to ship, transport, or receive any firearms or ammunition in interstate or foreign commerce.

Respondent found that Mr. David Kennison possessed the power to direct or cause the direction of the management and policies of the petitioner. He further found that Mr. Kennison had been convicted of a crime as defined by §§ 922(g) and (h), and therefore petitioner was not qualified under § 923 (d)(1)(B) for a Federal firearm license. Thus, respondent revoked petitioner's licenses.

The petition for review raises two objections to the respondent's decision:

1. The record does not justify the respondent's finding that Mr. Kennison was a person possessing, directly or indirectly, the power to direct or cause the direction of the management and policies of the petitioner.

2. Respondent did not comply with the notice and opportunity for a hearing provisions of 18 U.S.C. §§ 923(e) and 923(f)(1).

In regard to the first objection, the Court finds from the record that there was substantial evidence to support the respondent's decision that Mr. Kennison did have management control of the petitioner corporation. The record establishes that at the time the Federal firearm license applications were filed,

Mr. Kennison was a member of petitioner's Board of Directors and owned one-sixth of petitioner's stock. (Transcript of Administrative Hearing, p. 35). Further, during the hearing before Judge Travis, Mr. Kennison testified that he served as petitioner's Director. (Transcript, p. 18). Additionally, the license application forms, Government Exhibits Nos. 10-12, specifically identify Mr. Kennison as "Board Chairman". In the face of such overwhelming evidence, the respondent was correct in finding that Mr. Kennison had the power to direct the management and policies of petitioner corporation.

Petitioner's other objection to respondent's decision is based upon §§ 923(e) and 923(f)(1). Section 923(e) requires that parties be provided notice and an opportunity to be heard on matters concerning revocation of their firearms licenses. Section 923(f)(1) provides *inter alia* that any holder of a license which is revoked shall receive a written notice from the Secretary stating specifically the grounds upon which the license was revoked. Petitioner contends that respondent did not comply with these sections because the issue of petitioner's qualifications under § 923(d)(1)(B) was never discussed during the hearing before Judge Travis.

The record does not support petitioner's claim. The Notices of Contemplated Revocation that were issued to petitioner read as follows:

> The Regional Regulatory Administrator, Bureau of Alcohol, Tobacco and Firearms, Southeast Region, has reason to believe that you have violated the provisions of Chapter 44, Title 18, U.S.C., in that your application for license as [a manufacturer of ammunition for firearms other than destructive devices or ammunition

> for other than destructive devices and a collector of curios and relics] dated March 15, 1975, and May 10, 1976, you made a false representation in response to the question contained in Item 24A. of said application wherein you represented that no responsible official of your company as listed in Item 21 of said application had been convicted in any court of a crime punishable by imprisonment for a term exceeding one year whereas in truth and in fact David F. Kennison, Board Chairman of your company, was convicted January 14, 1975, in the District Court of Iowa in and for Des Moines County, of the crime of carrying a concealed weapon, said crime being punishable by imprisonment for a term exceeding one year, all in violation of Title 18 United States Code, Section 924(a). (GX-1-3.)

Petitioner received these notices three months before the informal hearing with the Regional Regulatory Administrator and eight months before the hearing with Judge Travis. These notices clearly indicate to the petitioner that one of the issues to be considered by the Government would be whether or not Mr. Kennison was a responsible official of petitioner as that term is used in § 923(d)(1)(B).

Additionally, during the hearing before Judge Travis the Government introduced into evidence without objection from petitioner, Government's Exhibit 14, which was a certified copy of the transcript of the informal hearing before the Regional Regulatory Administrator. Government Exhibit 14 contains the following introductory statement by the Government attorney:

> [This proceeding is] to determine whether or not these gentlemen, at the time they filed their

> application for a license, that Mr. Kennison was qualified to obtain a license within the provisions of 18 U.S.C. 923, its the position of the Government that he was not because he had been convicted of a felony in the State of Iowa.
>
> (Transcript pp. 6-7).

There is also contained in this exhibit a letter dated December 28, 1976, from the Regional Counsel to petitioner's attorney. This letter was issued over four months prior to the informal hearing and over eight months before the hearing before Judge Travis. In this letter, Regional Counsel advised petitioner's attorney as to the status of petitioner's licenses as follows:

> . . . This corporation filed applications for a license . . . David F. Kennison was named as Board Chairman. The answers to question 24(a) of the applications reflected no person named as a responsible person of the applicant had been convicted in any court of a crime punishable by imprisonment for a term exceeding one year. In reliance upon the applications, licenses were issued to the New-Banner Institute, Inc., on July 17, 1976. Subsequent investigation developed that David F. Kennison on January 14, 1975, had been convicted in the District Court of Iowa in and for Des Moines County of the crime of carrying a concealed weapon and placed under deferred sentence. Mr. Kennison appears to have satisfactorily completed the conditions of the deferred sentence and the record was expunged.
>
> . . . Accordingly, the application is false with respect to Mr. Kennison's having been convicted. The New Banner Institute, Inc. was not entitled

> to a license. 18 U.S.C. 923(d)(1)(B). Mr. Kennison was advised of this fact and the company was offered the opportunity to voluntarily surrender their licenses....
>
> It is our position that the above is grounds for the revocation of the licenses issued to New-Banner Institute, Inc. 18 U.S.C. 923(f). The steps to initiate proceedings to revoke the licenses will be forthcoming....

Thus, on no fewer than four separate occasions petitioner and its attorney received notice that petitioner's qualifications for a license under § 923(d)(1)(B) was one of the issues to be considered by respondent. Petitioner cannot now complain that it was not properly notified in accordance with § 923(e) and § 923(f)(1). These notice provisions are not mere formalisms designed to restrict the Government in its proof. Rather, their purpose is to provide the license holder with notice of the charges against him so that he may prepare a defense. *Rich* v. *United States*, 383 F. Supp. 797, 801 (S.D. Ohio 1974). Such purpose is satisfied, and there is no due process violation, if the notified party "understood the issue" and "was afforded full opportunity" to justify its conduct. *National Labor Relations Board* v. *Mackay Radio & Telegraph Company*, 304 U.S. 333, 350, 58 S.Ct. 504, 82 L.Ed 1381 (1938); *Golden Grain Macaroni Company* v. *FTC*, 472 F.2d 882, 885-886 (9th Cir. 1972). The Court finds that this standard has clearly been met in petitioner's case and that respondent has fully complied with the provisions of §§ 923(e) and 923(f)(1).

To summarize, the record establishes that there was substantial evidence to suport respondent's finding

that Mr. Kennison was an individual possessing, directly or indirectly, the power to direct or cause the direction of the management and policies of petitioner. The record further supports respondent's decision to revoke petitioner's Federal firearm license because petitioner was not qualified for such licenses under § 923(a)(1)(B). Finally, the notice provided petitioner as to the charges against it was sufficient to meet the requirements of §§ 923(e) and 923(f)(1), and the due process clause of the Fourteenth Amendment.

IT IS, THEREFORE, ORDERED that respondent's motion for summary judgment, pursuant to Rule 56, be and the same is hereby granted.

AND IT IS SO ORDERED.

/s/ Robert F. Chapman
ROBERT F. CHAPMAN
United States District Judge

TRUE COPY
Test:

MILLER C. FOSTER, JR.
Clerk

/s/ Sandra F. Whitlaw
By: Deputy Clerk

January 30th, 1980
Columbia, South Carolina

APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA COLUMBIA DIVISION

Civil Action 79-943

NEW BANNER INSTITUTE, INC., PLAINTIFF

vs

G. R. DICKERSON, DIRECTOR BUREAU OF ALCOHOL, TOBACCO AND FIREARMS, DEFENDANT

ORDER

This matter is before the Court upon remand from the United States Court of Appeals for the Fourth Circuit. The Appellate Court instructed this Court to vacate the Bureau of Alcohol, Tobacco and Firearms' revocation of the three licenses issued by the Bureau of Alcohol, Tobacco and Firearms to New Banner Institute, Inc. to deal in firearms.

IT IS, THEREFORE, ORDERED that the prior revocation by the Bureau of Alcohol, Tobacco and Firearms of the three licenses previously issued to New Banner Institute, Inc. is hereby vacated and plaintiff is authorized to deal in firearms pursuant to said licenses. If because of the passage of time said licenses are out of date, the plaintiff may apply for new licenses which shall not be denied by the Bureau of Alcohol, Tobacco and Firearms upon the basis of

the prior conviction of David Kennison, which conviction has previously been expunged from the record by the courts in the State of Iowa.

AND IT IS SO ORDERED.

/s/ Robert F. Chapman
ROBERT F. CHAPMAN
United States Circuit Judge

TRUE COPY:

Test:

JOHN W. WILLIAMS
Clerk

/s/ Margaret Giacobbi
By: Deputy Clerk

September 23, 1981

Columbia, South Carolina

APPENDIX F

DECISION OF THE ACTING DIRECTOR APPROVING, IN PART, AND DISAPPROVING, IN PART, THE FINDINGS, CONCLUSIONS AND RECOMMENDED DECISION OF THE ADMINISTRATIVE LAW JUDGE, AND DIRECTING REVOCATION OF LICENSES

This matter comes before me, the Acting Director of the Bureau of Alcohol, Tobacco and Firearms, pursuant to Title 27, Code of Federal Regulations, Part 178, Subpart E (Commerce in Firearms and Ammunition) to approve or disapprove Findings, Conclusions and Recommended Decision of Administrative Law Judge Kenneth L. Travis, dated November 1, 1977, in the above proceeding.

The Administrative Law Judge has, as provided by 27 C.F.R. § 178.77, certified and submitted to me the complete record of proceedings before him, including his Findings, Conclusions, and Recommended Decision. I have fully considered the record before me in this case including the Recommended Decision of the Administrative Law Judge.

BACKGROUND

The Administrative Law Judge's Findings of Fact are substantially as follows:

1. On May 14, 1976, the Respondent filed three applications with the Bureau of Alcohol, Tobacco and Firearms. Each application showed David Kennison as Chairman of the Respondent's board and a "responsible" person in item 21. The applications were for licenses as a dealer in firearms other than destructive de-

vices or ammunition for other than destructive devices, a manufacturer of ammunition for firearms other than destructive devices, and a collector of curios and relics. The licenses were all issued.

2. On or about September 8, 1974, Mr. Kennison, Chairman of the Board of Directors of Respondent, was arrested in Iowa on a charge of kidnapping. On January 14, 1975, an Iowa court dismissed the kidnapping charge against Mr. Kennison. Further, on January 14, 1976, Mr. Kennison in an Iowa District Court entered a plea of guilty to carrying a concealed weapon which carried a five year maximum prison sentence. The court ordered that judgment be deferred and the defendant be placed on probation. It was further provided that upon fulfillment of probation, an order could be entered discharging the defendant without entry of judgment.

3. On or about February 5, 1976, the District Court in Iowa discharged Mr. Kennison from probation and the criminal record with reference to the deferred judgment was ordered expunged.

4. While in Iowa, Mr. Kennison was assured by his attorney, a Mr. Bryant Schulte, and by the Judge, that by pleading guilty to the charge of possessing a firearm, unless he was convicted of a crime subsequently and thereby violated his probation, judgment would be withheld and under Iowa law no conviction would occur and the record would be expunged.

5. The applications for licenses under Chapter 44, Title 18, United States Code were filed with the Bureau of Alcohol, Tobacco and Firearms subsequent to the receipt by Mr. Kennison of notice from the Iowa Court that the Iowa case was closed without entry of judgment. When the applicant answered the questions on the applications for licenses under the Gun Control Act indicating whether or not there had been a conviction in any court of a crime punishable by imprisonment for a term exceeding one year, his answers were based upon the advice of his attorney, the judge, and the prosecuting attorney. He also based the answer on the advice of South Carolina Department of Probation officials and upon the advice of an official of ATF from the ATF office in Columbia, South Carolina.

6. Respondent's position is that Mr. Kennison was never convicted of a crime of any type in Iowa, since judgment was never entered, the case was dismissed, and the record was expunged.

The Administrative Law Judge's Conclusions of Law are substantially as follows:

1. In 1975, Mr. David Kennison pled guilty in the State of Iowa to a crime punishable by imprisonment for a term exceeding one year. Under the prevailing case law this represented a conviction of such a crime within the meaning of 18 U.S.C. §§ 922(g) and (h).

2. Although the applicant knew the circumstances surrounding Mr. David Kennison's plea of guilty to a crime punishable by imprisonment for a term exceeding one year in Iowa in 1975,

in the three applications in question, questions 24(a) were answered "no." However, the Respondent gave negative answers to questions 24(a) on each application in the honest belief that such answers were truthful. This was not an example of knowingly making a false statement of representation. It was not a willful violation.

3. No evidence was presented to support any conclusions that the applicant has ever willfully violated any provisions of Chapter 44, Title 18, of the United States Code or the regulations prescribed by the Secretary under said chapter. A showing of willfulness is required to sustain the revocation of licenses involved herein. The three notices of revocation should be dismissed because the Respondent prevailed by a preponderance of substantial evidence.

The record in this case shows that on January 6, 1977, the Regional Regulatory Administrator of the Bureau of Alcohol, Tobacco and Firearms in Atlanta, Georgia, issued Notices of Contemplated Revocation of License to New-Banner Institute, Inc., pursuant to 18 U.S.C. § 923(e) and 27 C.F.R. § 178.73. (GX-1-3.) On April 6, 1977, a hearing on said Notices was held pursuant to 27 C.F.R. § 178.74, and on May 27, 1977, the Regional Regulatory Administrator, Southeast Region, issued Notices of Revocation of License. (GX-5-7.) Upon Respondent's request for a hearing (GX-8) and pursuant to the provisions of 18 U.S.C. § 923(f)(2), a hearing to review Respondent's license revocations was held before Administrative Law Judge Travis on September 7, 1977. The Administrative Law Judge in a Recommended Decision dated November 1, 1977, concluded that any

violation of Chapter 44 or regulations promulgated thereunder the Respondent may have committed in applying for its licenses were not willful violations. Therefore, the Recommended Decision of Judge Travis does not recommend revocation of the licenses of New-Banner Institute, Inc.

I hereby approve the Administrative Law Judge's above-noted Findings of Fact and Conclusions of Law, Nos. 1-2 and disapprove the Administrative Law Judge's above-noted Conclusions of Law, No. 3, and Recommended Decision as more fully discussed below.

ISSUES

Three issues are presented in this license revocation proceeding. The first issue is whether Mr. Kennison was convicted of a crime punishable by imprisonment for a term exceeding one year as that term is used in the Federal firearms law. The second issue is whether the Respondent violated any provisions of Chapter 44, Title 18, United States Code within the meaning of 18 U.S.C. § 923(e). The final issue is whether Respondent was initially eligible to receive Federal firearms licenses.

Prior to discussing these issues, consideration shall be given to whether Respondent received notice and a full and fair hearing.

Section 923(f)(1), Title 18, U.S.C. states, in pertinent part, that any holder of a license which is revoked shall receive a written notice stating specifically the grounds upon which the license was revoked. A Federal District Court explains that the notice provisions of section 923(f)(1) are not mere formalisms designed to restrict the Government in its proof. Their purpose is to provide the license holder with notice of the charges that he may prepare a de-

fense. *Rich* v. *United States*, 383 F.Supp. 797, 801 (S.D. Ohio 1974).

The purpose of section 923(f) and due process requirements are satisfied if the party proceeded against, "understood the issue" and "was afforded full opportunity" to justify its conduct. *See NLRB* v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333, 350, 58 S.Ct. 904, 82 L.Ed. 1381 (1938); *Golden Grain Macaroni Company* v. *FTC*, 472 F.2d 882, 885-886 (9th Cir. 1972); *L.G. Balfour Co.* v. *FTC*, 442 F.2d 1, 19, 21 (7th Cir. 1971); *REA Trucking Co.* v. *NLRB*, 439 F.2d 1065 (9th Cir. 1971); *Swift & Co.* v. *United States*, 393 F.2d 247, 5 A.L.R. Fed. 709 (7th Cir. 1968); *J.B. Williams Co.* v. *FTC*, 381 F.2d 884 (6th Cir. 1967). The question on review is not adequacy of original notice or pleading, but fairness of the whole proceeding, that is, whether the party actually litigated an issue and had an opportunity to defend.

The fact at issue, conviction status of Mr. Kennison, under both revocation theories of 18 U.S.C. § 923(e) based upon a violation of law, and 18 U.S.C. § 923(d)(1)(B) based upon failure to meet qualifications for a license, is identical.

The Notices of Contemplated Revocation given the Respondent concern alleged violations of Chapter 44, specifically, 18 U.S.C. § 924(a), which center around the fact "David F. Kennison, Board Chairman of your company, was convicted January 14, 1975, in the District Court of Iowa in and for Des Moines County, of the crime of carrying a concealed weapon, said crime being punishable by imprisonment for a term exceeding one year." (GX-1-3.) The entire record clearly shows that the focus of the hearing was whether Mr. Kennison was a "convicted" person.

Thus, I find that the record shows that Respondent received actual notice of, understood, and fully litigated, the fact as issue.

Further, at the hearing before the Administrative Law Judge the Government's evidence consisted of the same evidence which was presented at the informal hearing. After introduction of the Government exhibits the Government rested its case. Respondent's counsel had "no objections" to the introduction into evidence of Government Exhibit 14, a certified copy of the transcript of the informal hearing including the exhibits. (Tr. 9, 16 and 17.) Government Exhibit 14, contains the following statement by the Government attorney:

> "This proceeding is . . . to determine whether or not these gentlemen, at the time they filed their application for a license, that Mr. Kennison was qualified to obtain a license within the provisions of 18 USC 923, it's the position of the Government that he was not because he had been convicted of a felony in the State of Iowa." (Pp. 6-7.)

Additionally, Government Exhibit 14 contains a letter dated December 28, 1976, from Regional Counsel to Respondent's attorney. This letter was applicant's Exhibit 9 at the informal hearing. In this letter which was prior to the revocation proceedings Regional Counsel advised Respondent's attorney as to the status of New-Banner Institute, Inc.'s licenses as follows:

> ". . . This corporation filed applications for a license . . . David F. Kennison was named as Board Chairman. The answers to question 24 (a) of the applications reflected no person named

> as responsible person of the applicant had been convicted in any court of a crime punishable by imprisonment for a term exceeding one year. In reliance upon the applications, licenses were issued to the New-Banner Institute, Inc., on June 17, 1976. Subsequent investigation developed that David F. Kennison on January 14, 1975, had been convicted in the District Court of Iowa in and for Des Moines County of the crime of carrying a concealed weapon and placed under deferred sentence. Mr. Kennison appears to have satisfactorily completed the conditions of the deferred sentence and the record was expunged.
>
> . . . Accordingly, the application is false with respect to Mr. Kennison's having been convicted. The New Banner Institute, Inc. was not entitled to a license. 18 U.S.C. 923(d)(1)(B). Mr. Kennison was advised of this fact and the company was afforded the opportunity to voluntarily surrender their licenses. . . .
>
> It is our position that the above is grounds for the revocation of the licenses issued to New Banner Institute, Inc. 18 U.S.C. 923(f). The steps to initiate proceedings to revoke the licenses will be forthcoming. . . ."

Thus, I find that the record shows that Respondent received actual notice of the Government's revocation theories based upon 18 U.S.C. § 923(e) and 18 U.S.C. § 923(d)(1)(B).

Accordingly, I conclude that the Respondent was given adequate notice of the gravamen of the issues to be litigated and was granted a full and fair hearing and opportunity to defend.

I. *Conviction*

It is undisputed that on January 14, 1975, David F. Kennison entered a plea of guilty to the charge of carrying a concealed weapon in the State of Iowa. Pursuant to Iowa Code § 789A.1 upon receipt of the plea of guilty, the trial court deferred judgment and placed the defendant Kennison on probation, and after serving the probationary term, he was discharged without entry of judgment. (Gov. Brief p. 4 and Respondent's letter dated October 14, 1977. *See also* GX-13.) Iowa Code § 695.3 provides that the punishment for carrying a concealed weapon will be a fine of not more than $1,000.00 or imprisonment for not more than five years, or both such fine and imprisonment.

Respondent argues that Mr. Kennison has not been convicted of a crime punishable by imprisonment for a term exceeding one year, since judgment was never entered, the case was dismissed, and the record expunged. (Entire Record.) The Administrative Law Judge concluded that Mr. Kennison was convicted of a crime within the meaning of 18 U.S.C. §§ 922(g) and (h).

(Recommended Decision, Conclusions of Law No. 1.)

The question of whether one has been previously convicted of a crime punishable by imprisonment for a term exceeding one year as that term is used in the Federal firearms law is a question of law. *United States* v. *Beebe*, 467 F.2d 222, 225 (10th Cir. 1972).

Iowa Code § 789A.1 provides, *inter alia*, that upon a plea of guilty, verdict of guilty, or a special verdict upon which a judgment of conviction may be rendered, a trial court may defer judgment or suspend sentence in a criminal case and place the defendant on probation. Further, Iowa Code § 789A.6 provides

that a person who has been discharged from probation arising out of the deferred judgment shall no longer be held for his offense and that the court's criminal record with reference to the deferred judgment shall be expunged.

Respondent contends since adjudication of guilt was withheld in Mr. Kennison's case, there is no conviction. Respondent relies upon *State* v. *Farmer*, 234 N.W.2d 89, 92 (Iowa 1975) which involves the above-referenced Iowa Code. In that case the defendant pled guilty to a charge of false uttering of a check and was placed on probation under section 789A.1. Subsequently, his probation was revoked and he was sentenced to an indeterminate prison term. On appeal defendant contended his sentence was invalid because the trial court failed to adjudicate his guilt after revoking his probation and before pronouncing sentence. The court held that although the better practice is for a trial court to expressly adjudicate guilt, a judgment imposing sentence on the charge is sufficient to constitute an adjudication of guilt. Respondent refers to *dicta* in the *Farmer* case which states that if the defendant is discharged from probation under section 789A, no conviction occurs in a strict legal sense because no adjudication of guilt is made. (Respondent's Brief, p. 10.) As authority for this proposition the Iowa Court cites *State* v. *Hannah*, 179 N.W.2d 503, 507-508 (Iowa 1970). The *Hannah* case involved a prosecution for keeping on licensed premises non-taxpaid liquor. The Iowa Liquor Control Law provides that a conviction for such a violation shall cause the license held to be revoked. Defendant pled not guilty to the charge, and the case was tried by a jury which returned a guilty verdict. Based upon defendant's post trial motions

the trial court refused to pronounce judgment and sentence and further ruled that the Liquor Control Commission was without authority to revoke defendant's liquor license because he had not been convicted of the crime. In reversing the trial court on this point the Iowa Supreme Court held:

> "The word 'conviction' is of equivocal meaning, and its use in a statute presents a question of legislative intent.
>
> In the restricted or *technical legal sense* in which it is sometimes used, the word 'conviction' includes the status of being guilty of, and sentenced for, a criminal offense, whether that status is established after confession of guilt by a guilty plea or after determination by a jury verdict upon an assertion of innocence. Stated otherwise technically the word means the final consummation of the prosecution against the accused including the judgment or sentence rendered pursuant to an ascertainment of his guilt.
>
> In its general and popular sense and frequently in its *ordinary legal sense*, the word 'conviction' is used in the sense of establishment of guilt prior to and independently of judgment and sentence by a verdict of guilty or a plea of guilty. . . . (Citations omitted.)
>
> The word 'conviction' is used in its ordinary legal sense in [this section] to signify merely an ascertainment of guilt in the trial court and not as requiring entry of a judgment thereon as a basis for license revocation and bond forfeiture required by this section." (Pp. 507-508.)

(*See* 21 Am. Jur. 2d Criminal Law § 495; 24 C.J.S. Criminal Law § 1556(2); and 9A Words and Phrases, pp. 270-282.) (Emphasis added.)

Additionally, the United States Supreme Court has said that a plea of guilty is more than a confession or admission, but is itself a conviction. *Boykin* v. *State of Alabama*, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1968) and *Kercheval* v. *United States*, 274 U.S. 220, 47 S.Ct. 582, 71 L.Ed. 1009 (1926).

The Federal courts have consistently taken the position that the term "conviction" is used in the *ordinary legal sense* in the Federal firearms laws; that is, a conviction occurs upon entry of a plea of guilty or when guilt is otherwise determined by a court of jury. *United States* v. *Hartsfield*, 387 F. Supp. 16 (M.D. Fla. 1975) and *United States* v. *Locke*, 409 F. Supp. 600 (D.C. Idaho 1976). Furthermore, subsequent State court proceedings which suspend sentencing, set aside a plea or verdict of guilty upon a successful completion of probation, or other expungement procedures under State law do not eliminate the underlying conviction insofar as Federal firearms law is concerned. *United States* v. *Locke*, 542 F.2d 800 (9th Cir. 1976); *United States* v. *Potts*, 528 F.2d 883 (9th Cir. 1976); *United States* v. *Kelly*, 519 F.2d 794 (8th Cir. 1975); *United States* v. *Rosenstengel*, 323 F. Supp. 499 (E.D. Mo. 1971).

In view of the foregoing, I concur with the Administrative Law Judge and hereby find that, as a matter of law, Mr. Kennison was convicted of a crime punishable by imprisonment for a term exceeding one year and under 18 U.S.C. §§ 922(g) and (h) he is prohibited from shipping, transporting and receiving firearms in interstate or foreign commerce.

II. *Revocation Based Upon 923(e)*

Section 923(e) of Title 18, U.S.C. provides that the Secretary may, after notice and opportunity for hearing, revoke any license issued under section 923 if the holder of such license has violated any provision of Chapter 44 or regulations issued thereunder.

The Notices of Contemplated Revocation charge Respondent with violating 18 U.S.C. § 924(a). (GX-1-3.) Section 924(a) provides, in pertinent part, that "[w]hoever . . . knowingly makes any false statement or representation with respect to the information required by the provisions of this chapter . . . in applying for any license . . . shall be fined . . . or imprisoned . . . or both. . . ." The phrase "knowingly makes any false statement" means the making of a statement with actual knowledge of or with an awareness of the high probability of its falsity. *United States* v. *Squires*, 440 F.2d 859, 863 (2d Cir. 1971).

Government Exhibits Nos. 10-12 represent three firearms license applications wherein Mr. David F. Kennison is listed in item 21 as a "responsible" person. The applications state in item 24 that neither the applicant nor any person named in item 21 has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year.

Having determined that Mr. Kennison has been convicted of a crime punishable by imprisonment for a term exceeding one year, any contrary statement to that effect made by Respondent would be a false statement. The question presented is whether Respondent in indicating that Mr. Kennison had not been convicted of a crime punishable by imprisonment for a term exceeding one year made that false

statement with actual knowledge of its falsity or with an awareness of the high probability of its falsity.

In effect Respondent claims a mistake of law to negate the showing that it "knowingly" made a false statement. A mistake of law occurs when a person is truly acquainted with the existence or nonexistence of facts but is ignorant of or comes to an erroneous conclusion as to their legal effect. Respondent throughout these proceedings claimed that Mr. Kennison was not "convicted," this claim resulted from a mistake as to the legal effect of the guilty plea and withholding adjudication of guilt. If Respondent actually held a bona fide, albeit erroneous, belief as to the legal meaning of the deferred judgment and expungment procedures such belief would negate the mental element, knowledge, required to sustain a finding that he knowingly made a false statement. *See United States* v. *Squires, supra.*

Whether Respondent "truly believed" Mr. Kennison was not a convicted person is a question of fact. Mr. Kennison testified that based upon advice of the Iowa judge, his attorney, prosecuting attorney, and South Carolina Department of Probation officials he understood that by pleading guilty to this charge, unless he was convicted of a crime within a subsequent year, that judgment will be withheld and under Iowa law, that no conviction would occur, that the record would be expunged, and that there would be no necessity of application for restoration of rights, since no conviction would have occurred under the Iowa law. (Tr. 23 and 29.) Further, Mr. Kennison testified that Respondent was advised over the telephone by someone in the ATF office in Columbia, South Carolina, that it would not be necessary to say anything about the Iowa incident on the firearms

application forms. (Tr. 39-40.) In view of this testimony the Administrative Law Judge concluded:

> "Although the applicant knew the circumstances surrounding Mr. David Kennison's plea of guilty to a crime punishable by imprisonment for a term exceeding one year in Iowa in 1975, in the three applications in question, questions 24(a) were answered 'no.' However, the applicant gave negative answers to questions 24(a) on each application in the honest belief that such answers were truthful. This was not an example of knowingly making a false statement or representation. . . ." (Recommended Decision, Conclusion of Law No. 2.)

I concur with the Administrative Law Judge that the evidence presented at the hearing was not such to allow the conclusion that Respondent knowingly made a false statement. I, therefore, find that Respondent did not violate section 924(a).

III. *License Eligibility*

Next we turn to the issue of whether the Respondent was initially eligible to receive Federal firearms licenses.

In setting forth the qualifications for a Federal firearms license 18 U.S.C. § 923(d)(1) provides, among other things, that the applicant (including, in the case of a corporation, any individual possessing, directly or indirectly, the power to direct or cause the direction of the management and policies of the corporation) shall not be prohibited from transporting, shipping or receiving firearms or ammunition in interstate or foreign commerce under sections 922(g) and (h). 18 U.S.C. §§ 922(g) and

(h) provide, *inter alia*, that it shall be unlawful for any person who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year to ship or transport any firearm or ammunition in interstate or foreign commerce, and to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

The record establishes that Mr. Kennison at the time the Federal firearms license applications were filed was a member of the Board of Directors of New-Banner Institute, Inc., and was part owner of Respondent, specifically owning one-sixth of the stock. (Tr. 35.) Further, on September 7, 1977, at the hearing Mr. Kennison testified that he was Director of Respondent. (Tr. 18.) Additionally, the license application forms, Government Exhibits Nos. 10-12, specifically item 21, identify Mr. Kennison as "Board Chairman." Thus, I find that Mr. Kennison was an individual possessing, directly or indirectly, the power to direct or cause the direction of the management and policies of Respondent.

Furthermore, I find that the record in this license revocation proceeding establishes that (1) at the time the Respondent applied for and received the Federal firearms licenses, Mr. Kennison had been convicted of a crime punishable by imprisonment for a term exceeding one year; (2) Mr. Kennison's conviction prohibited him from shipping, transporting or receiving firearms or ammunition in interstate or foreign commerce under sections 922(g) and (h); and (3) when Respondent applied for the Federal firearms licenses Mr. Kennison, a person possessing the power to direct or cause the direction of the management and policies of the corporation, was under a disability which precluded him and thereby the Re-

spondent from being granted a Federal firearms license under section 923(d)(1)(B).

The above findings established, as a matter of law, Respondent was not qualified for a license under 18 U.S.C. § 923(d)(1)(B) in 1976 through the present because of Mr. Kennison's conviction. Under 18 U.S.C. § 923(d)(1)(B) the Director must refuse to issue a license to an "applicant" convicted of a crime punishable by imprisonment for a term exceeding one year. The salient fact is that Mr. Kennison is prohibited, as a matter of law, from engaging in the very activities that the Federal firearms licenses cover. That is, transporting, shipping or receiving firearms or ammunition covered by such licenses in interstate or foreign commerce. (18 U.S.C. § 923(c).) A license may be revoked for any reason that would have justified a refusal to issue it in the first instance. *See Butcher* v. *Maybury*, 8 F.2d 155 (D.C. Wash. 1925), and 53 C.J.S. Licenses § 44(b). Therefore, the Director can revoke a license based *solely* on the fact that the licensee or a responsible person is a convicted person under disabilities imposed by 18 U.S.C. §§ 922(g) and (h). To hold otherwise would create a anomalous situation whereby a revocation proceeding would become an exercise in futility if after establishment that the licensee is a convicted person not qualified for a firearms license the Director could not revoke the license but must wait to deny renewal of the license based upon the same grounds after a duplicate hearing.

Accordingly, I conclude, that as the Respondent was not eligible to receive Federal firearms licenses in 1976 through the present because of Mr. Kennison's conviction, the licenses are hereby revoked because Respondent is not qualified for such licenses under section 923(d)(1)(B).

CONCLUSION

In light of the foregoing, I find that the Administrative Record established that the Respondent's Federal firearms licenses should be revoked. The ground for revocation is that Respondent was not qualified under section 923(d)(1)(B) to receive Federal firearms licenses (in 1976 through the present) because of Mr. Kennison's conviction.

THEREFORE, on this 13th day of February, 1979, the aforementioned Findings, Conclusions, and Recommended Decision are approved, in part, and disapproved, in part. It is hereby ordered that the Regional Regulatory Administrator, Southeast Region, issue Final Notices of Revocation on form 4501.

/s/ John S. Kregman
Acting Director

APPENDIX G

DECISION OF ADMINISTRATIVE LAW JUDGE TRAVIS

Mr. David F. Kennison is Chairman of the Board of Directors of the New Banner Institute, a corporation in Columbia, South Carolina, which hold licenses under Chapter 44, Title 18, United States Code, as a dealer in firearms other than destructive devices or ammunition for other than destructive devices, as a collector of curios and relics, and as a manufacturer of ammunition for other than destructive devices. On January 6, 1977, the Bureau of Alcohol, Tobacco and Firearms issued notices of contemplated revocation of each of the licenses. The Respondent requested a hearing thereon which was held in Columbia, South Carolina on April 9, 1977. On May 27, 1977, the Bureau issued notices of revocation of each of the licenses. This was followed by a request for a formal hearing which was held in Columbia, South Carolina on Wednesday, September 7, 1977, before the undersigned.

The Government is represented by Mr. John A. Macomber, Office of Regional Counsel, Bureau of Alcohol, Tobacco and Firearms, P.O. Box 2994, Atlanta, Georgia.

The respondent is represented by Mr. Ronald Hall and Mr. Jack McGuinn, Attorneys at Law, 1610 Bull Street, Columbia, South Carolina 29210.

Authority to revoke the licenses lies in Section 923(e) of Title 18 of the United States Code which provides as follows: "(e) The Secretary may, after notice and opportunity for hearing, revoke any license issued under this section if the holder of such license has violated any provision of this chapter or

any rule or regulation prescribed by the Secretary under this chapter. The Secretary's action under this section may be reviewed only as provided in subsection (f) of this section."

Section 923(e) of Title 18 of the United States Code has been uniformly interpreted so that the word "willfully" is inserted between the words "has" and "violated" meaning that the Secretary may only revoke such a license if it is shown that the holder thereof has "willfully violated" any provisions of Chapter 44 of Title 18 of the United States Code. In other words, revocation does not lie for nonwillful, accidental, unintentional mistakes.

SUMMARY OF CASE

David F. Kennison was married and lived in Columbia, South Carolina. His wife left him and went to Iowa. Mr. Kennison went to Iowa in 1974 for the purpose of bringing his wife back to South Carolina. He attempted to do this but was charged in Iowa with kidnapping his wife. The charge of kidnapping was dropped and Mr. Kennison pleaded guilty to carrying a concealed weapon, which carries a five year maximum prison sentence. In an order dated January 14, 1975, the District Court for the 8th Judicial District of Iowa found that the defendant, Mr. Kennison, consented to a deferment of sentence and, based upon his good record, a deferred sentence should be granted. The Court ordered that judgment be deferred, that Mr. Kennison be placed on probation and upon the fulfillment of the terms of the probation an order may be entered discharging the defendant without entry of judgment. Later, the criminal record was expunged and the defendant discharged from probation. At this time he was advised that he had no criminal record as judg-

ment had never been entered against him. Subsequent to this, Mr. Kennison and the New Banner Institute made application for the three licenses under the Gun Control Act. In answer to question 24(a) on each of the applications, the applicant answered "no." The question was: "Has applicant or any person named in item 21 ever been convicted in any court of a crime punishable by imprisonment for a term exceeding one year." Mr. Kennison was listed in item 21 on each of the applications as Chairman of the Board of Directors of the Corporation. The criminal statute that Mr. Kennison pleaded guilty to violating in Iowa was a crime punishable by imprisonment for a term exceeding one year.

Mr. Kennison testified that he was advised by his Judge in Iowa, by his probation officer, by his attorney in Iowa, and by his attorneys in South Carolina, that he was not convicted in Iowa, that judgment was never entered against him, and therefore, if anyone asked him if he had ever been convicted of a crime he could say no because he was not convicted of a crime. This is supported by the letter of Mr. Kennison's Iowa probation officer, Mr. Russell D. Frye, who advised, in a letter received by the Bureau of Alcohol, Tobacco and Firearms' on October 29, 1976, that records concerning Mr. Kennison's case had been expunged at the Des Moines Iowa Courthouse. Mr. Kennison's opinion is further supported by a January 7, 1977, Iowa Governor's Office letter giving the offhand opinion that in a case involving a deferred sentence, which was not a part of a person's criminal record, it would not be necessary for restoration of any citizenship rights.

The Government Attorney insists that by pleading guilty to the Iowa criminal charge Mr. Kennison was actually convicted of a crime punishable by im-

prisonment for a term exceeding one year. He feels that it is not necessary to show that Mr. Kennison knew that he was a convicted felon, but that it is merely necessary that Mr. Kennison be shown to have known what happened in Iowa, and then that he knowingly failed to include it on the applications for licenses. The Attorney for the Government further urges that since under the case law on the subject Mr. Kennison is a convicted felon and cannot receive firearms interstate and he could not, if the facts had been known, have been issued a license, revocation would be appropriate. It is interesting to note, however, that in each notice of revocation the Regional Regulatory Administrator found that the licensee willfully violated provisions of the Gun Control Act of 1968 (Chapter 44, Title 18, United States Code) and it was upon this basis that the notices of revocation were issued.

FINDINGS OF FACT

1. On May 14, 1976, the Respondent filed three applications with the Bureau of Alcohol, Tobacco and Firearms. Each application showed David Kennison as Chairman of the Respondent's board and a "responsible" person in item 21. One was an application for license as a dealer in firearms other than destructive devices or ammunition for other than destructive devices. The second was an application for a license as a manufacturer of ammunition for firearms other than destructive devices and the third was an application for a license as a collector of curios and relics. These applications were filed under Chapter 44, Title 18, United States Code and Part 178 of the Code of Federal Regulations. The licenses were all issued. (GX 10, 11, 12, and 14).

2. On or about September 8, 1974, Mr. Kennison, Chairman of the Board of Directors of applicant, was arrested in Iowa on a charge of kidnapping. (Tr. 19, GX-14).

3. On January 14, 1975, an Iowa Court in Des Moines, Iowa, dismissed the kidnapping charge against Mr. Kennison. (Tr. 20, 21, GX-14).

4. On January 14, 1976, after Mr. Kennison entered a plea of guilty in a District Court of Iowa, to carrying a concealed weapon which carried a five year maximum prison sentence, the Court found that he had no prior felony or misdemeanor conviction or any juvenile record, that he had stable employment and therefore a deferred sentence should be granted. The Court accordingly ordered that judgment be deferred and the defendant was placed on probation. It was further provided that upon fulfillment of probation, an order could be entered discharging the defendant without entry of judgment. (GX 13 and 14).

5. On or about February 5, 1976, the District Court in Iowa discharged Mr. Kennison from probation and the criminal record with reference to the deferred judgment was ordered expunged. (GX-13, see also paragraph 2 in the argument of the Attorney for the Government on page 4 of the Government's Brief and letter type reply briefs of each party).

6. While in Iowa, Mr. Kennison was assured by his attorney, a Mr. Bryant Schulte, and by the Judge, that by pleading guilty to the charge of possessing a firearm, unless he was convicted of a crime subsequently and thereby violated his probation, judgment would be withheld and under Iowa law no conviction would occur and the record would be expunged. Tr. 22, 23).

7. Following Mr. Kennison's plea in the State of Iowa, his firearm was returned to him and he was

allowed to go home to South Carolina. One year later he notified the Iowa Court that he had successfully completed his probation. The arrest record was then expunged. (Tr. 24).

8. The applications for licenses under Chapter 44, Title 18, United States Code were filed with the Bureau of ATF subsequent to the receipt by Mr. Kennison of notice from the Iowa Court that the Iowa case was closed without entry of judgment. (Tr. 29, GX-14).

9. When the applicant answered the questions on the applications for licenses under the Gun Control Act indicating whether or not there had been a conviction of a crime punishable by imprisonment for a term exceeding one year, his answers were based upon the advise of his attorney, the judge, and the prosecuting attorney. He also based the answer on the advise of South Carolina Department of Probation officials and upon the advise of an official of the Bureau of ATF from the ATF Office in Columbia, South Carolina. (Tr. 29, 30, 39, 40).

10. Mr. Kennison is now represented by Attorneys Ronald Hall and Jack McGuinn, who do not believe that he has ever been convicted of a crime of any type in Iowa. They are of the opinion that since judgment was never entered, that the case was dismissed, and the record was expunged, no conviction has ever occurred. (Entire Record).

11. The Bureau of ATF issued notices of contemplated revocation of each license. A hearing was held as to each notice and notices of revocation were then issued which were based upon alleged untruthful answers to application questions being willful violations of Chapter 44, Title 18, U.S.C. (GX-5, 6, 7, and 14).

12. A hearing on the notices of revocation was held on September 7, 1977, in Columbia, South Carolina.

CONCLUSIONS OF LAW

1. In 1975, Mr. David Kennison pleaded guilty in the State of Iowa to a crime punishable by imprisonment for a term exceeding one year. Under the prevailing case law this represented a conviction of such a crime within the meaning of Section 922(g) and (h) of Title 18 of the United States Code.

2. Although the applicant knew the circumstances surrounding Mr. David Kennison's plea of guilty to a crime punishable by imprisonment for a term exceeding one year in Iowa in 1975, in the three applications in question, questions 24(a) were answered "no." However, the applicant gave negative answers to questions 24(a) on each application in the honest belief that such answers were truthful. This was not an example of knowingly making a false statement or representation. It was not a willful violation.

3. No evidence was presented to support any conclusion that the applicant has ever willfully violated any provisions of Chapter 44, Title 18, of the United States Code or the regulations prescribed by the Secretary under said chapter.

4. A showing of willfulness is required to sustain the revocation of the licenses involved herein.

5. The three notices of revocation should be dismissed because the Respondent prevailed by a preponderance of substantial evidence.

RULINGS ON GOVERNMENT'S PROPOSED FINDINGS OF FACT

1. Government's proposed finding of fact No. 1 is approved. Similar facts are contained in my finding of fact No. 1.

2 & 3. Government's proposed findings of fact 2 and 3 are approved as accurate. See my findings of fact 1 and 2.

4 & 5. Government's proposed findings of fact 4 and 5 are approved as accurate. Essentially the same facts are contained in my finding of fact No. 11.

6. Government's proposed finding of fact No. 6 is approved as accurate. Essentially the same facts are contained in my findings of fact 4 and 5.

7. Government's proposed finding of fact No. 7 is approved as accurate. However, it should be pointed out that there is no evidence in the record to suggest to me that any incorrect entries in any of the applications were knowingly made or represented a willful violation of the law or regulations.

RULINGS ON GOVERNMENT'S PROPOSED CONCLUSIONS OF LAW

Government's proposed conclusion of law No. 1 is of doubtful validity. I know of no case which held that a criminal court action such as that which involved Mr. Kennison in the State of Iowa was considered a conviction for all purposes. It appears to me that the better argument is that it is considered a conviction. It should be said, however, that it was the intention of the Iowa Court to keep Mr. Kennison's record clean so that he would not be burdened with a conviction record in the event that he should encounter just such a situation as the one at hand. I therefore, have grave doubts as to the validity of Government's proposed conclusion of law No. 1.

2. Government's proposed conclusion of law No. 2 is rejected. If there were false statements, they were not the type that would authorize revocation. Revocation can only result if there has been a willful vio-

lation of Chapter 44, Title 18, United States Code or the regulations thereunder. If an applicant sincerely believes that every answer that he gave on an application for a license was true and correct and one turns out to have been incorrect, we cannot say that this mistake was willfully committed. Also, the answers given to paragraph 24(a) of each application cannot be considered examples of knowingly making a false statement within the meaning of 18 U.S.C. 924(a). The false nature of the answer must have been known before we can say that the answer violated 18 U.S.C. 924(a).

REPONDENT'S BRIEF

The Respondent filed a written brief which was received by the Office of the Administrative Law Judge on September 22, 1977. There was no listing therein of proposed findings of fact or conclusions of law. Generally, the Respondent argues that the criminal proceedings in the State of Iowa involving Mr. Kennison did not amount to a conviction, and even if, technically, there was a conviction, there was no willful violation which would justify revocation of the licenses.

I agree with the Respondent that there was no showing of a willful violation of Chapter 44, Title 18, of the United States Code or the regulations. The question of whether or not there was a conviction presents more of a problem. The case law now supports the conclusion that there was a conviction. However, the courts which made these decisions were not faced with the facts of this case. I have grave doubts about calling the Kennison guilty plea "a conviction." I need not face the issue directly because this recommended decision should not be altered regardless of

whether there actually was a "conviction." If Mr. Kennison is ever arrested for allegedly having violated 18 U.S.C. app 1202 or 16 U.S.C. 922(g) or (h), this question might be tested by the courts. However, I doubt that any special agent of Treasury would make such an arrest and if he did, I doubt that any U.S. Attorney would authorize prosecution. With this in mind, if this represented a clearly defined violation of the firearms laws, there would have been a criminal prosecution, but obviously there was not. Mr. Kennison has admitted transporting a firearm interstate in 1975, after his plea of guilty to the crime punishable by imprisonment for more than one year. Such an admission is part of the record in this file. If the guilty plea was a conviction, why wasn't there a criminal prosecution? I conclude that the legal conclusions of the government regarding "conviction" are in doubt and the case has little or no prosetion appeal."

DISCUSSION

Only one ground exists upon which the licenses in this case may be revoked and it is found under Section 923(e) of Title 18 of the United States Code. It is also mentioned in Section 188.73 of Title 27 of the Code of Federal Regulations. The law provides that after notice and opportunity for hearing the Secretary may revoke any license issued under this section if the holder has violated any provisions of Chapter 44, or any rule or regulations prescribed by the Secretary under this Chapter. We have uniformly held that there must be a willful violation. The regulation provides that whenever the Regional Regulatory Administrator has reason to believe that a licensee has "willfully" violated any provision of the Act or regu-

lation, he may issue a notice of contemplated revocation. This amounts to the same thing and it is the beginning of revocation proceedings.

This case is very simple. I am totally convinced, from the evidence, that the Respondent did not willfully violate any provisions of Chapter 44 or the Regulations. When the Respondent stated that neither Mr. Kennison nor any of the others involved in the company had ever been convicted of a crime punishable by imprisonment for a term exceeding a year it did not willfully commit a violation. At the time, the Respondent was convinced that these answers were absolutely correct. Even now, the Respondent feels that Mr. Kennison has not been convicted of any felony at all. The Respondent's officers are convinced and they have been told by their attorneys that although there was a guilty plea, there was never an entry of judgment and the case was dismissed. This they are told does not amount to a conviction of anything and if they were required to answer such a question again in writing they would again say "no." Accordingly, we can not, by any stretch of the imagination, call their actions willful.

The Bureau of ATF apparently reasons that although we have not had a willful violation of the United States Code or the regulations, we have had a conviction. This is, under the prevailing court decisions, correct. Under the case law cited hereafter, Mr. Kennison can be considered a person who has been convicted of a crime punishable by imprisonment for a term exceeding one year. Although Mr. Kennison disagrees with this, he is wrong. Although he honestly believes that the Government is wrong, he is wrong and the Government is correct. He was in fact convicted of a felony. Accordingly, the Bureau

of ATF could deny renewal of his application for license and prevail. The reason for this is that under the law and regulations, it is unlawful for a convicted felon to ship or transport any firearms or ammunition in interstate or foreign commerce and it is also unlawful for a person such as Mr. Kennison to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce. These provisions are found in 18 U.S.C. 922 (g) and (h). Under Section 923(d)(1)(B), an application would be denied on the grounds that the applicant is prohibited from transporting, shipping, or receiving firearms or ammunition in interstate or foreign commerce under Section 922(g) and (h) of this chapter. The Bureau of ATF apparently feels that this also forms a basis to revoke a license. In other words, if the holder of a license is convicted of a crime punishable by a term of imprisonment exceeding one year why not revoke his license during revocation proceedings because the license, which must be renewed yearly, can not be renewed. Why merely follow form over substance and dismiss the revocation proceedings only to go into a denial proceedings soon there after, and take the license away by denial of renewal. Why not merely revoke it now and get it over with.

The answer to the foregoing question is that a license holder must have due process and the law must be followed. He must have notice and opportunity for hearing. He has had no notice that the license would be revoked merely on the grounds of a crime punishable by imprisonment for a term exceeding one year. The only notice he received was that revocation would be based upon the willful falsification of each of the applications by failing to say "yes." Mr. Kennison was convicted of a crime pun-

ishable by imprisonment for a term exceeding one year. Even in the May 27, 1977, decisions of the Regional Regulatory Administrator following the informal hearing as to the notices of contemplated revocation it was found as follows: "I conclude that the licensee willfully violated the provisions of the Gun Control Act of 1968, and is not, entitled to a license." This was based totally on the alleged falsification of the answers to questions 24(a) in each of the applications for license. If the agency is to revoke a license based upon a felony conviction, the license holder should receive notice and have an opportunity for a hearing thereon. No such notice has even been given. I am also of the opinion that the conviction alone is not grounds for revocation.

The Respondent cites *United States* v. *Hedgecoe*, 420 F.2d 458 (4th Cir. 1970) in which a convicted felon executed forms 4473 when purchasing firearms. On these Federal forms, he stated that he had not been convicted. However, he did not read the forms before signing them. The Court suggested that there was an insufficient showing that the defendant acted with the requisite knowledge. This gives us some insight as to what the term "knowingly" means in 18 U.S.C. 924(a).

The Respondent also cited *State* v. *Farmer*, 234 N.W. 2d 89 (Supreme Ct. Iowa 1975) which held "if the defendant is discharged from probation under #789 A.6, no conviction occurs in the strict legal sense because no adjudication of guilt is made. See State v. Hanna, 179 N.W. 2d 503 (Iowa 1970). However, when probation is violated, 'the court may enter an adjudication of guilt and proceed as otherwise provided.' #789 A.1, The Code."

In *State* v. *Hanna*, the court said ". . . The word "conviction" is of equivocal meaning, and its use in a statute presents a question of legislative intent.

In the restricted or technical legal sense in which it is sometimes used, the word "conviction" includes the status of being guilty of, and sentenced for, a criminal offense, whether that status is established after confession of guilt by a guilty plea or after determination by a jury verdict upon an assertion of innocence. Stated otherwise technically the word means the final consummation of the prosecution against the accused including the judgment or sentence rendered pursuant to an ascertainment of his guilt.

In its general and popular sense and frequently in its ordinary legal sense, the word "conviction" is used in the sense of establishment of guilt prior to and independently of judgment and sentence by a verdict of guilty or a plea of guilty. . . . (cases cited)

The word "conviction" is used in its ordinary legal sense in section 123.100 to signify merely an ascertainment of guilt in the trial court and not as requiring entry of a judgment thereon as a basis for license revocation and bond forfeiture required by this section. . . ."

The Respondent argues in light of the foregoing, that the statute should be construed strictly. I agree.

The Respondent also cited *State* v. *Wright*, 202 N.W. 2d 72 (Iowa 1972) which discusses the Iowa law prior to the enactment of a statute authorizing the deferring of imposition of sentence.

In the Brief of the Government *Kercheval* v. *United States*, 274 U.S. 220 (1927), and *Boykin* v. *Alabama*, 395 U.S. 238 (1969) were cited. These cases held: "A plea of guilty is more than a confession which admits that the accused did various acts; it is itself a conviction; nothing remains but to give judgment and determine punishment."

The Attorney for the Government also cited *United States* v. *Hartsfield*, 387 F. Supp. 16 (M.D. Fla. 1975). This was a case in which the Court held for the defendant. The Bureau of ATF and the United States Attorney took the position that the defendant was still under indictment when he executed a Form 4473 on which he stated that he was not at the time of the purchase under indictment or information. The United States Attorney urged that the man was still under indictment because the court had not found him guilty under his guilty plea. The District Court held for the defendant and dismissed the case. The District Court held that the defendant is considered convicted upon the entry of a plea of guilty, even though adjudication of guilt was withheld. The Court reasoned that therefore the defendant was no longer under indictment or information. In a sense this case is strikingly similar to the one at hand. Under Florida law the defendant pleaded guilty to a felony information and under a Florida statute very similar to the Iowa statute, adjudication of guilt was withheld and the defendant was placed on probation. The decision in the case was based upon the determination of the Florida court that under Florida law a man is considered convicted upon the entry of his plea of guilty.

The Government also relies upon *United States* v. *Locke*, 409 F. Supp. 600 (D. Idaho 1976), aff'd, 542 F. 2d 800 (9th Cir. 1976). In this case the defendant was convicted of receiving and possessing firearms while a convicted felon (18 U.S.C. app. 1202(a)(1)). The question was whether or not the defendant was considered a convicted felon. He had entered a plea of guilty in the State of Idaho to a charge of burglary in the night time. The State judge ordered sentencing

withheld for a period of three years and the defendant was placed on probation for that period of time. In this case the defendant admitted that he never sought relief from his conviction under the pertinent Idaho statute. In other words, the sentence could have been expunged but it never was. The defendant was therefore considered a convicted felon and the conviction in the District Court was affirmed. The Court noted however that the crimes that were charged did not require a specific intent and therefore the fact that the defendant was advised by a public defender that he was not a convicted felon was not relevant. In our instant case, however, intent is important and very relevant.

In connection with the *Locke* case the Government cited *United States* v. *Potts*, 528 F. 2d 883 (9th Cir. 1975). Here the Court held that the defendant's prior conviction was admissable. The prior conviction was expunged pursuant to a State of Washington statute which although speaking of release of all the penalties and disabilities resulting from the conviction provides that in a subsequent criminal prosecution the prior conviction may be pleaded and proved. Under the Washington law the only exception to the statutory release of all penalties and disabilities is found in the provision that the guilty plea will count as a conviction in any subsequent criminal prosecution. It should be noted carefully however that the Court also cited *Tembruell* v. *City of Seattle*, 392 P. 2d 453 (Washington 1964) in which the Court held, when construing a police pension statute, that ". . . the police officer's plea of guilty to grand larceny, coupled with his award of probation and the subsequent dismissal of the information do not add up to a conviction of a felony within the intendment

of the police pension statute (R.C.W. 41.20-110) even though this sequence of events might be specifically considered by the court as a prior conviction in a later criminal action. . . ."

The latter conclusion is very significant to this case in that under the law in the State of Washington, when a conviction is expunged it cannot be considered a conviction for civil purposes but may be cited as a conviction in a subsequent criminal case. Our case is civil.

I have discussed the foregoing case law in depth without drawing a conclusion. The purpose is merely to illustrate how confusing the issue is. In view of this conglomeration of court decisions which point in so many different directions, how can we expect the applicant to know whether or not he has been convicted of a crime punishable by imprisonment for a term exceeding one year in connection with his Iowa episode. I believe it would be normal for people like Mr. Kennison to believe the Iowa judge, the prosecutor, the Iowa defense attorney, the attorneys who are representing him in this case and the person he talked to from the Bureau of ATF around the time the applications were executed and come to the conclusion that he was never convicted of a felony. In view of this conclusion I must hold that the Government has failed to show any willful violation of Chapter 44 of Title 18 of the United States Code or regulations promulgated thereunder within the meaning of Section 923(e) of Title 18, of the United States Code and there is no valid showing that anyone knowingly made a false statement or representation with respect to information required in applying for a license under Chapter 44, Title 18, United States Code.

DECISION AND ORDER

I hold that the Government has failed in this case to prove the charges in the notice of revocation and the applicant continues to hold the belief that none of the responsible individuals in the corporation, including Mr. Kennison, have ever been convicted of a crime punishable by a term exceeding one year. In view of this it is recommenred that the notices of revocation be cancelled and that the Respondent's license privileges be allowed to continue.

/s/ Kenneth L. Travis
KENNETH L. TRAVIS
Administrative Law Judge

Nov. 1, 1977

Washington, D.C.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1981 350414 699

Opposition

Office - Supreme Court, U.S.
FILED
FEB 22 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1180

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981

G. R. DICKERSON, DIRECTOR, BUREAU OF ALCOHOL, TOBACCO AND FIREARMS, PETITIONER

v.

NEW BANNER INSTITUTE, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

JACK F. McGUINN
Attorney
1610 Bull Street
Columbia, S. C. 29201
(803) 256-0600

ON THE BRIEF:
LEWIS C. LANIER
Of McGuinn and Lanier

RESPONDENT'S QUESTIONS AND ADDITIONAL REASONS TO AFFIRM OR DENY PETITION

1. Court is without jurisdiction in that, under Rule 17.1(a) of the Revised Rules of the Supreme Court of the United States, the granting of the Petition is not a matter of right, but of judicial discretion, and can be granted hereunder only when there are special and important reasons therefor. Although the decision in this cause is in apparent conflict with those of other courts of appeal ("on the same matter"), such alleged conflict is merely apparent and not real because this case fails to affect "persons under deferred judgment statutes" in that the Administrative Law Judge (sole trier of fact) found there to be "no willful violation of Chapter 44, Title 18, of the United States Code or the regulations."

Such finding being too narrow to reach the requirements of such rule, thereby mooting the matter for present purposes.

2. This Court is without jurisdiction in the premises in that President Reagan's present dismantling of Petitioner's office and Bureau removes the matter from the realm of:

(a) Rule 17.1 of the Revised Rules of the Supreme Court of the United States, and

(b) Under Rule 22.6 of the Revised Rules of the Supreme Court of the United States as "or other intervening matter" unavailable as a reason sooner.

3. This Honorable Court is without jurisdiction in that both parties concede there was no felony conviction:

(a) as found by the trial officer,

(b) as affirmed by Petitioner, and

(c) as confirmed by District and Appellate Courts.

As a consequence, there is no "Question Presented" by Petitioner.

4. This Honorable Court has no jurisdiction in that Petitioner's attempt to tailor his Petition under 18 U.S.C. 923 (d)(1)(B) is contrived in his own certain knowledge; the "Question Presented" cannot possibly fit under 18 U.S.C. 924(a) for the reasons stated *supra* #3 hereof and constitutes a bald attempt to open the door wider thereby stretching (dehors the record) to reach beyond his question attempted to be so presented. Moreover, such attempt is merely an extension of Petitioner's finding of a case never noticed, tried, nor found by the trial officer, but rather statedly averted on

the face of the trial officer's findings.

5. This Honorable Court is without jurisdiction in that Rule 33.7 of the Revised Rules of the Supreme Court of the United States provides the Clerk shall not accept for filing any document presented in a form not in compliance with this Rule, but shall return it indicating to the defaulting party wherein he has failed to comply. Rule 33.2(b)(1) of the Revised Rules of the Supreme Court of the United States provides Petitions for Certiorari shall be covered in white, whereas tan, appropriate to joint appendices and "all other documents", has been used in violation of such Rule.

6. That, failing in the above, this Honorable Court should deny the Petition on the ground that the so-called "acknowledged" holdings otherwise than herein,

from the Fifth, Eighth and Ninth Circuits, are clearly distinguishable and/or inapposite.

7. That failing in the above, Respondent, concurring in Petitioner's averment "[m]ake it difficult, if not impossible, for the Bureau of Alcohol, Tobacco and Firearms to achieve predictable and uniform enforcement of the federal firearms laws." Respondent would show such alleged lack of predictability and/or uniformity expose the violation in this cause of the Equal Protection Clause of the United States Constitution.

8. That, failing in the above, this Honorable Court should deny the Petition as attempting to distort the record to submerge the facial violation of Due Process of Law Clause of the United States Constitution as found on the record by the trial officer.

TABLE OF CONTENTS

	Page
ARGUMENTS:	1
Re Question 1	3
Re Question 2	7
Re Question 3	9
Re Question 4	10
Re Question 5	15
Re Question 6	17
Re Question 7	54
Re Question 8	55
CONCLUSION:	59
RESPONDENT'S ADDITIONAL APPENDICES:	
Appendix A	1a
Appendix B 118a	
Appendix C 122a	

TABLE OF AUTHORITIES

Cases: Pages

Barker v. *United States*,
579 F.2d 1226 21

Barret v. *United States*,
423 U.S. 212, 216 ..... 39, 51

Bell v. *United States*,
349 U.S. 81, 83 40

Cassity v. *United States*,
522 F.2d 1320 ..... 34, 35, 36, 45

Dorszynski v. *United States*,
418 U.S. 424, 432-435 45

Garcia-Gonzales v. *Immigration and Naturalization Service*,
344 F.2d 804 35

Huddleston v. *United States*,
415 U.S. 814 ..... 29, 31

Hudspeth v. *Melville*,
127 F.2d 376 48

Iowa Beer and Liquor Control Department v. *McBain*, 263 N.W.2d 226 ..... 18, 52

Jerome v. *United States*, 318 U.S. 101 ..... 46, 47

Kelly v. *Immigration and Naturalization Service*, 349 F.2d 475 36

Ladner v. *United States*, 358 U.S. 169, 177-178 40

Lewis v. *United States*, 445 U.S. 55, 61, 63 ..... 21, 22, 45

Minshen v. *United States*, 410 F.2d 396, 397 44

N.L.R.B. v. *Natural Gas Utility District*, 402 U.S. 600 52

Patt v. *Nevada State Board of Accountancy*, 93 Nev. 548, 571 18

Rewis v. *United States*, 401 U.S. 808, 812 40

Richards v. *United States*,
192 F.2d 602, 606 50

Rzeznik v. *Chief of Police of Southhampton*, 373 N.E.2d 1128 18

Scarborough v. *United States*,
429 U.S. 815 ..... 37, 38, 39

Seaboard Airline Ry. v. *Horton*,
233 U.S. 492, 503 47

State v. *Farmer*,
234 N.W. 2d, 89 23

Thrall v. *Wolfe*,
503 F.2d 313, cert. denied,
420 U.S. 972 ..... 17, 48, 49, 50

United States v. *Arrington*,
618 F.2d 1119 ..... 20, 43

United States v. *Bass*,
404 U.S. 336 ..... 32, 33

United States v. *Benson*,
605 F.2d 1093 ..... 32, 33, 34, 36

United States v. *Bergeman*,
592 F.2d 537 .. 17, 20, 22, 24, 29, 33, 34

United States v. *Brzoticky*,
588 F.2d 775 20

United States v. *Fryer*,
545 F.2d 11 ..... 20, 45

United States v. *Gradwell*,
243 U.S. 476, 485 47

United States v. *Hoctor*,
487 F.2d 270 50

United States v. *Mostad*,
485 F. 2d 199, 200 cert. denied,
415 U.S. 947 20

United States v. *Pelzer*,
312 U.S. 399, 402 47

United States v. *Purgason*,
565 F.2d 1279 ..... 20, 23, 45

United States v. *Slutzky*,
79 F.2d 504, 505 48

United States v. *Universal C.I.T. Corp.*, 344 U.S. 218, 221-222 40

United States v. *Vice*, 562 F.2d 1004,
cert. denied 435 U.S. 951 45

Statutes and Regulations: Pages

Code of Federal Regulations,
§ 188.73 of Title 27 55
Federal Bank Robbery Act, § 2(a) ... 46-48
Federal Youth Corrections Act,
18 U.S.C. §§5005-5026 (1976) .. 21, 43
Omnibus Crime Control and Safe
Streets Act of 1968, Pub. L.
No. 90-351, 82 Stat. 197,
amended by the Gun Control
Act of 1968, Pub. L. No. 90-
618, 82 Stat. 1213 (Chapter
44, Title 18) 3, 4, 5, 48, 55
18 U.S.C. 921 *et seq.* 30
18 U.S.C. 922(a)(6) 20
18 U.S.C. 922(a)(6) 30, 45
18 U.S.C. 922(g) .. 11, 19, 22, 23, 57
18 U.S.C. 922(h) 11, 19, 22, 23
39, 43, 51, 57

18 U.S.C. 922(h)(1) 25, 27, 28
29, 32, 33, 34

18 U.S.C. 923(d)(1)(B) . 10, 11, 19, 57

18 U.S.C. 923(e) 12, 19, 55

18 U.S.C. 923(f)(1) 12, 19

18 U.S.C. 923(f)(3) 49

18 U.S.C. 924(a) 6, 10, 19

18 U.S.C. 927 ..... 17, 27

18 U.S.C. 1202(a) 41, 42

18 U.S.C. 1202(a)(1) 40

18 U.S.C. 3231 24

Alaska Stat. §12.55.085 (1980) 18

Ark. Stat. Ann. §43-2344
(1977 Repl.) 18

Fla. Stat. Ann. §948.01 (West 1973
and Cum. Supp. 1981) 18

Ill. Food and Drug Law 34

N.H. Rev. Stat. Ann. §651:5 (1974) .. 18

N.J. Rev. Stat. (1937) §2:103-5,
§2:103-6, §2:132-1b 48

N.M. Stat. Ann. §31-20-9 (1980) 18

Nev. Rev. Stat. §176.225 (1979) 18

Revised Rules of the Supreme
Court of the United States:

Rule 17.1 ..... 3, 7

Rule 22.6 ..... 7, 8

Rule 33.7(b) 15, 16

U. S. Constitution:

Article IV, §1 49

Article IV, §2 ..... 17 - 55

Amendment V 36, 54, 55, 57-58

Amendment XI 35

Amendment X 35, 37

Amendment XIV 36

Miscellaneous:

114 Cong. Rec. 13869 41

114 Cong. Rec. 14773 42

Rep. No. 1097, 90th Cong., 2nd.
Sess. 28, 76-77 (1968) 17

"Conviction Defined"-40 J. State
Bar of Calif. 36 (1965) ..... 34 - 37

REFERENCE OF OPINIONS DELIVERED

U. S. COURT OF APPEALS:

Reported at 649 F.2d 216

.... Petitioner's Appendix A, 1a-10a

U. S. DISTRICT COURT:

Not reported

... Petitioner's Appendix D, 13a-20a

ACTING DIRECTOR, B.A.T.F.:

Not reported

... Petitioner's Appendix F, 23a-40a

ADMINISTRATIVE LAW JUDGE, B.A.T.F.:

Not reported

... Petitioner's Appendix G, 41a-58a

ENTRY OF APPEARANCE

Respondent attorney's appearance herein has been earlier noted on the Record with the Clerk of this Honorable Court.

STATEMENT REQUIRED UNDER RULE 28.1, REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES

Respondent corporation has neither parent nor non-wholly owned subsidiary nor affiliate company.

CONSTITUTIONAL PROVISIONS

U. S. Constitution, Amendment XIV, §1.:

> "... nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Juncture:

Please see Respondent's Appendix C, 173a and 174a.

Disposition:

There was no disposition on the question of "equal protection" by Judge Travis because he reached his decision in the light of more narrow findings:

> "I need not face the issue ["conviction"] directly because this recommended decision should not be altered regardless of whether there actually was a "conviction.""

(Petitioner's Appendix G, 49a - 50a) However, he concluded "that a license holder must have due process and the law must be followed," (Petitioner's Appendix G, 52a) as the basis for his final decision and order.

In response to the Acting Director's reversal of Judge Travis' decision, Respondent (here) raised the issue in the Petition to the District Court. (Respondent's Appendix B, 120a) The District Court held that "the notice provided petitioner ... was sufficient to meet the requirements of ... the due process clause," but failed to address the issue of equal protection. (Petitioner's Appendix D, 13a - 20a)

In response to the District Court's decision, Respondent (here) raised the issues of due process and equal protection

in its brief before the Court of Appeals. (Respondent's Appendix A, 1a - 117a) There was no disposition of Constitutional questions by the Circuit Court, however, since it was found necessary to "only address the issue of Kennison's Iowa "conviction" inasmuch as our resolution of that issue is dispositive of this appeal." (Petitioner's Appendix A, 5a - 6a)

U. S. Constitution, Amendment V:

> "... nor shall any person be ... deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Juncture:

Please see Respondent's Appendix B, 120a.

Disposition:

Same as for Amendment XIV, *supra*.

U. S. Constitution, Article I, §9:

"... [N]o bill of attainder of ex post facto law shall be passed...."

Juncture:

Please see Respondent's Appendix A, 66a - 68a.

Disposition:

Circuit Court found it unnecessary to consider Constitutional questions for disposition of the appeal. (Petitioner's Appendix A, 5a - 6a)

U. S. Constitution, Amendment XIV, §1:

"... [N]o state shall make or enforce any law which shall abridge the priviledges or immunities of citizens of the United States...."

Juncture:

Please see Respondent's Appendix A, 68a - 71a.

Disposition:

Same as for Article I, §9, *supra*.

U. S. Constitution, Article IV, §2:

"The citizens of each state shall be entitled to all the priviledges and immunities of citizens in the several states."

Juncture:

Please see Respondent's Appendix A, 68a - 71a.

Disposition:

Same as for Article I, §9, *supra*.

U. S. Constitution, Amendment IX:

"The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

Juncture:

Please see Respondent's Appendix A, 89a - 97a.

Disposition:

Same as for Article I, §9, *supra*.

U. S. Constitution, Amendment X:

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."

Juncture:

Please see Respondent's Appendix A, 89a - 97a.

Disposition:

Same as for Article I, §9, *supra*.

XXVII

U. S. Constitution, Amendment VIII:

"Excessive bails shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

Juncture:

Please see Respondent's Appendix A, 109a - 114a.

Disposition:

Same as for Article I, §9, *supra*.

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981

No. 81-1180

G. R. DICKERSON, DIRECTOR, BUREAU OF ALCOHOL, TOBACCO AND FIREARMS, PETITIONER

v.

NEW BANNER INSTITUTE, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

RESPONDENT'S ARGUMENTS

We do not agree the reason presented by Petitioner is so substantial as to require consideration warranting either briefs or

other arguments on the merits for the resolution of this cause on the basis of the questions herein presented and the arguments herein contained read in the light of the additional appendices herein coupled with those tendered by Petitioner.

1. Court is without jurisdiction in that, under Rule 17.1(a) of the Revised Rules of the Supreme Court of the United States, the granting of the Petition is not a matter of right, but of judicial discretion, and can be granted hereunder only when there are special and important reasons therefor. Although the decision in this cause is in apparent conflict with those of other courts of appeal ("on the same matter"), such alleged conflict is merely apparent and not real because this case fails to affect "persons under deferred judgment statutes" in that the Administrative Law Judge (sole trier of fact) found there to be "no willful violation of Chapter 44, Title 18 of the United States Code or the regulations." Such finding being too narrow to reach the requirements of such Rule, thereby mooting the matter for present purposes.

Revised Rules of the Supreme Court of the United States, Part V. Jurisdiction on Writ of Certiorari, Rule 17.1(a), provides:

> "When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision."

Administrative Law Judge Travis maintained in response to RESPONDENT'S BRIEF:

> "I agree with the Respondent [New Banner Institute] that there was no showing of a willful violation of Chapter 44, Title 18, of the United States Code or the regulations. The question of whether or not there was a conviction presents more of a problem. The case law now supports the conclusion that there was a conviction. However, the courts which made these decisions were not faced with the facts of this case. I have grave doubts about calling the Kennison guilty plea "a conviction". I need not face the issue directly because this recommended decision should not be altered regardless of whether there actually was a "conviction"." (Petitioner's Appendix, p. 49a *et seq.*)

Administrative Law Judge Travis' RULINGS ON GOVERNMENT'S PROPOSED FINDINGS OF FACTS, Paragraph 7, states:

> "Government's proposed finding of fact No. 7 is approved as accurate. However, it should be pointed out that there is no evidence in the record to suggest to me that any incorrect entries in any of the applications were knowingly made or represented a willful violation of the law or regulations". (Petitioner's Appendix, p. 48a)

In Administrative Law Judge Travis' RULINGS ON GOVERNMENT'S PROPOSED CONCLUSIONS OF LAW, he states:

> "Government's proposed conclusion of law No. 1 is of doubtful validity. I know of no case which held that a criminal court action such as that which involved Mr. Kennison in the State of Iowa was considered a conviction for all purposes. It appears to me that the better argument is that it is considered a conviction. It should be said, however, that it was the intention of the Iowa Court to keep Mr. Kennison's record clean so that he would not be burdened with a conviction record in the event that he should encounter just such a situation as the one at hand. I therefore, have grave doubts as to the validity of Government's proposed conclusion of law No. 1.
>
> "2. Government's proposed conclusion of law No. 2 is rejected. If there were false statements, they were not the type that would authorize revocation. Revocation can only result if there has been a willful violation of Chapter 44, Title 18, United States Code or the regulations thereunder. If an applicant sincerely believes that every answer that he gave on an application for a license was true and correct and one turns out to

2. This Court is without jurisdiction in the premises in that President Reagan's present dismantling of Petitioner's office and Bureau removes the matter from the realm of:

(a) Revised Rules of the Supreme Court of the United States, Rule 17.1, and

(b) Under Rule 22.6, as "or other intervening matter" unavailable as a reason sooner.

(a) Revised Rules of the Supreme Court of the United States, Rule 17.1, states:

> "A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor..."

(b) Revised Rules of the Supreme Court of the United States, Rule 22.6 states:

> "Any party may file a supplemental brief at any time while a petition for writ of certiorari is pending calling attention to new cases or legislation or other intervening matter not available at the time of the party's last filing."

> have been incorrect, we cannot say that this mistake was willfully committed. Also, the answers given to paragraph 24(a) of each application cannot be considered examples of knowingly making a false statement within the meaning of 18 U.S.C. 924(a). The false nature of the answer must have been known before we can say that the answer violated 18 U.S.C. 924(a). (Petitioner's Appendix, pp. 48a & 49a)

The Order of the District Court states:

> "A review of the record reveals that respondent's [Dickerson] decision to revoke petitioner's [New Banner Institute] Federal firearms licenses reversed an earlier recommended decision by Administrative Law Judge Kenneth Travis, dated November 1, 1977. The question before Judge Travis at the time he issued his recommendation that the licenses not be revoked, was whether or not petitioner had violated 18 U.S.C. § 924(a) by making false statements in its license applications...
>
> "Respondent approved that portion of Judge Travis' decision that petitioner had not violated § 924(a)." (Petitioner's Appendix, p. 14a)

It has come to the attention of the Respondent that President Reagan will be signing an Executive Order effective April 1, 1982, mandating the dismantling of Petitioner's office and Bureau. It is Respondent's intention to file a Supplemental Brief incorporating the above-referenced Executive Order as soon as it is published, pursuant to Rule 22.6 *supra*.

3. This Honorable Court is without jurisdiction in that both parties concede there was no felony conviction;

(a) as found by the trial officer,

(b) as affirmed by Petitioner, and

(c) as confirmed by District and Appellate Courts.

As a consequence, there is no "Question Presented" by Petitioner.

(a) Same as Argument 1.

(b) There is no disagreement as to the portion of the record suggested by Petitioner where these matters are conceded by both parties. They are, therefore, beyond argument.

(c) The Opinions of the District and Appellate Courts speak to this issue in their entirety (Petitioner's Appendix, pp. 13a-20a and 1a-10a.

4. This Honorable Court has no jurisdiction in that Petitioner's attempt to tailor his Petition under 18 U.S.C. 923 (d)(1)(B) is contrived in his own certain knowledge; the "Question Presented" cannot possibly fit under 18 U.S.C. 924(a) for the reasons stated *supra* #3 hereof and constitutes a bald attempt to open the door wider thereby stretching (dehors the record) to reach beyond his question attempted to be so presented. Moreover, such attempt is merely an extension of Petitioner's finding of a case never noticed, tried, nor found by the trial officer, but rather statedly averted on the face of the trial officer's findings.

This argument, in essence, is the same as stated in behalf of Questions 3 *supra*, and as follows:

(a) The District Court states:

> "However, he [Respondent Dickerson] reversed the recommendation that the licenses not be revoked on the grounds that petitioner was not qualified under 18 U.S.C. § 923 (d)(1)(B) to receive Federal firearms licenses. This section provides, among other things, that the license application shall be approved if the applicant (including in the case of a corporation, any individual possessing, directly or indirectly, the power to direct or cause the direction of the management and policies of the corporation) is not prohibited from

> transporting, shipping or receiving firearms or ammunition in interstate or foreign commerce under 18 U.S.C. §§ 922(g) and (h). Sections 922(g) and (h) provide *inter alia*, that it shall be unlawful for any person who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year to ship, transport, or receive any firearms or ammunition in interstate or foreign commerce." (Petitioner's Appendix, pp. 14a & 15a)

(b) The District Court further states:

> "Respondent found that Mr. David Kennison possessed the power to direct or cause the direction of the management and policies of the petitioner. He further found that Mr. Kennison had been convicted of a crime as defined by §§ 922(g) and (h), and therefore petitioner was not qualified under § 923(d)(1)(B) for a Federal firearm license. Thus, respondent revoked petitioner's licenses." (Petitioner's Appendix, p. 15a)

This part of the District Court Order is without basis on the record and is colored in far more than mere cosmetic, and no less than prophylactic effect.

(c) The District Court continues:

> "The petition for review raises two objections to the respondent's [Dickerson] decision:
>
> "1. The record does not justify the respondent's finding that Mr. Kennison was a person possessing, directly or indirectly, the power to direct or cause the direction of the management and policies of the petitioner.
>
> "2. Respondent did not comply with the notice and opportunity for a hearing provisions of 18 U.S.C. §§ 923(e) and 923(f)(1).
>
> "In regard to the first objection, the Court finds from the record that there was substantial evidence to support the respondent's decision that Mr. Kennison did have management control of the petitioner corporation. The record establishes that at the time the Federal firearm license applications were filed, Mr. Kennison was a member of petitioner's Board of Directors and owned one-sixth of petitioner's stock (Transcript of Administrative Hearing, p. 35). Further, during the hearing before Judge Travis, Mr. Kennison testified that he served as petitioner's Director. (Transcript, p. 18). Additionally, the license application forms, Government Exhibits Nos. 10-12, specifically identify Mr. Kennison as "Board Chairman". In the face of such overwhelming evidence, the respondent was correct in finding that Mr. Kennison had the power to direct the management and policies of

> petitioner corporation."(Petitioner's Appendix, pp. 15a & 16a)

The same is true of the District Court Order as stated immediately hereinabove and this is why the entire trial record will necessarily be required in the Appendix, *infra*.

It is impermissible to go on the record prior to the notices and hearing to an administrative employee's pre-trial "hearing". He was biased and had predetermined the course of the Bureau's intention and was merely "formalizing" same. The hearing under the Regulations before Administrative Law Judge Travis, as the whole record in the Appendix hereto reflects the Decision of Petitioner, like that of the District Court, is sham and dehors the record itself, a complete, shameless distortion of the true events which transpired. (See also Petitioner's Appendix F commencing at 23a and

compare to Respondent's full record, *infra* herein).

5. This Honorable Court is without jurisdiction in that Rule 33.7 of the Revised Rules of the Supreme Court of the United States provides the Clerk shall not accept for filing any document presented in a form not in compliance with this Rule, but shall return it indicating to the defaulting party wherein he has failed to comply. Rule 33.2(b)(1) of the Revised Rules of the Supreme Court of the United States provides Petitions for Certiorari shall be covered in white, whereas tan, appropriate to joint appendices and "all other documents", has been used in violation of such Rule.

The Revised Rules of the Supreme Court of the United States, Rule 33.7, states:

> "The Clerk shall not accept for filing any document presented in a form not in compliance with this Rule, but shall return it indicating to the defaulting party wherein he has failed to comply: the filing, however, shall not thereby be deemed untimely provided that new and proper copies are promptly substituted. If the Court shall find that the provisions of this Rule have not been adhered to, it may impose, in its discretion, appropriate sanctions including but not limited to dismissal of the action, imposition of costs, or disciplinary sanction upon counsel."

The Revised Rules of the Supreme Court

of the United States, Rule 33.2(b), states:

> "The following documents shall have a suitable cover consisting of heavy paper in the color indicated: (1) jurisdictional statements and petitions for writs of certiorari, white..."

6. That, failing in the above, this Honorable Court should deny the Petition on the ground that the so-called "acknowledged" holdings otherwise than herein, from the Fifth, Eighth and Ninth Circuits, are clearly distinguishable and/or inapposite.

As observed by Petitioner in Paragraph 4 of the Petition before this Court:

> "4. The decision below seriously interferes with the congressional aim of achieving a uniform, nationwide approach to what it regarded as a problem of national concern. See S. Rep. No. 1097, 90th Cong., 2d Sess. 28, 76-77 (1968). See also *United States* v. *Bergeman, supra,* 592 F.2d at 537.[13] Furthermore, it creates uncertainties for license applicants and seriously complicates the enforcement task of the Bureau of Alcohol, Tobacco, and Firearms.

"[13]Congress did provide in 18 U.S.C. 927 that it did not intend "to occupy the field" and thereby exclude any state law" on the same subject matter" that does not directly conflict with the federal statute. But as the Seventh Circuit has noted (*Thrall* v. *Wolfe, supra,* 503 F.2d at 317), that provision serves merely to avoid preempting state laws "on the same subject matter"—*i.e.*, laws that regulate firearms. A general law concerning treatment of defendants found guilty by plea or verdict is not a law on that subject matter."

"A survey of state laws concerning post-conviction treatment reveals a bewildering array of approaches. The differences are apparent from the very terms used to describe the effect of these laws on the plea or verdict of guilty: *e.g.*, "set[ting] aside the conviction: (Alaska Stat. § 12.55.085 (1980); "withhold[ing] the adjudication of guilt" (Fla. Stat. Ann. § 948.01 (West 1973 & Cum. Supp. 1981)); "annul[ling] the record of conviction" (N.H. Rev. Stat. Ann. § 651:5 (1974)); expunging the record of conviction (Ark. Stat. Ann. § 43-2344 (1977 Repl.)); dismiss[ing] criminal charges" (N.M. Stat. Ann. § 31-20-9) (Cum. Supp. 1980)}: or granting an "honorable discharge from probation" (Nev. Rev. Stat. § 176.225 (1979)). The statutes vary further as to such factors as the category of offenses and persons covered, the pre-requisites for relief, the discretion given to the trial court, and the purposes, if any, for which the plea or verdict of guilt may be used.[14]

"Because many state laws are vague concerning their intended effect, interpretation by the state courts is often necessary as to the effect of expunctions in differing contexts for differing purposes. See, *e.g.*, *Patt* v. *Nevada State Board of Accountancy*, 93 Nev. 548, 571 P.2d 105 (1977); *Rzeznik* v. *Chief of Police of Southhampton*, 374 Mass. 475, 373 N.E.2d 1128 (1978); *Iowa Beer and Liquor Control Department* v. *McBlain*, 263 N.W.2d 226 (Iowa 1977). Under the

> Gun Control Act as construed by the court of appeals in this case, it would be necessary for the Bureau, in making its enforcement decision, to construe a number of differing state laws in order to determine whether individuals found guilty of offenses that come within plain language of 18 U.S.C. 922(g) and (h) have received "unconditional and absolute" expunctions of their convictions.[15] We do not believe that this is what Congress intended in the broad regulatory scheme that it enacted; but in any event resolution of the issue by this Court is essential to give guidance to the Bureau, to license applicants, and to others affected by the restrictions of the federal firearms laws." (Petitioner's Petition For A Writ of Certiorari, pp. 19-21)

Whatever the Congressional aim against the gun receipt and possession, under Sections 924(a) and 923(d)(1)(B), as well as 923(e) and (f)(1) of Title 18 of the United States Code, as observed by the Appellate Court in the Opinion here sought to be overturned, (8a), there is no express exclusion of expunged convictions in the Act itself. The ultimate rationale for *United*

States v. *Bergeman* (9th Circuit) and *United States* v. *Mostad* (8th Circuit) "is, therefore, the failure of Congress specifically to address the use of expunged convictions under the Act—a rationale that would apply to convictions that have been expunged under either state or federal statutes.

"This rationale, however, was implicitly rejected by the courts in *Arrington*, *Purgason* and *Fryer*. Moreover, the Tenth Circuit, in considering a prosecution under 18 U.S.C. § 922 that was predicated on a conviction that had been expunged subsequent to the commencement of the federal prosecution, implied that, had the state conviction been expunged prior to commencement of the federal proceeding, it could not have served as the basis for a federal firearms conviction. *United States* v. *Brzoticky*, 588 F.2d at 775. A few months later, the same court stated that, without regard to whether the

predicate conviction is a federal or state one, "once one is convicted of a felony he is within the proscription against possession of firearms until that prior conviction is *actually* overturned or expunged." *Barker* v. *United States*, 579 F.2d at 1226 (emphasis in original)".... (Petitioner's Appendix, p. 8a)

The Appellate Court, embracing the reasoning of the courts in the Youth Corrections Act cases and of the Tenth Circuit in *Brzoticky* and *Barker*, offers two justifications for that choice:

> "First, by holding in *Lewis* that a firearms disability may be removed by vacation of the predicate conviction on appeal, the Supreme Court has recognized that convictions other than those expressly excluded from consideration by the terms of the Gun Control Act may not be used as the predicate for a federal firearms conviction. The *Lewis* Court reviewed "the language Congress chose as consistent with the common-sense notion that a disability based upon one's status as a convicted felon should cease only when the conviction upon

which that status depends has been vacated." *Lewis* v. *United States*, 445 U.S. at 61 n.5. We think this "common-sense notion" applies whether the predicate conviction has been vacated by appeal or by unconditional expunction.

"Second, while it is undoubtedly true that the construction of the word "convicted" used in the Gun Control Act is a matter of federal law, it is not at all inconsistent with that principle to find that Congress intended that a person whose conviction has been expunged under a state statute not be considered any longer "convicted." At least one court has found that it would be "anomalous" to pin the decision whether a person is a convicted felon at the time of a federal firearms prosecution on whether that person's conviction has been expunged under the law of the state in which he happened to be convicted. *United States* v. *Bergeman*, 592 F.2d at 537. Congress has expressly chosen to rely on state law in the federal firearms legislation, however, by allowing the various states to decide which crimes will carry the possibility of a sentence in excess of one year that is necessary to trigger a federal firearms disability. *See* 18 U.S.C. § 922(g) and (h). Indeed, had Kennison been convicted in his native South Carolina, where a charge of carrying a concealed weapon does not carry a sentence of greater than one year, rather than Iowa, where the same charge is a felony, he never would

have been subjected to a disability. Therefore, we see no anomaly in finding that Congress also intended to rely on state law for one method of removing that disability.

"Because an expunction under the Iowa "deferred judgment" statute, like one under the federal Youth Corrections Act, is unconditional and absolute, *see State* v. *Farmer*, 234 N.W.2d 89, 92 (Iowa 1975) (dictum), we find that the rationale used by this court in *Purgason* is equally applicable in this case. Therefore, we hold that, while Kennison was under a firearms disability during the period of his probation on the Iowa charge, the expunction of that charge upon the successful completion of his probation effectively removed that disability. Since the expunction occurred prior to the ATF's attempted revocation of New Banner's licenses, there was no ground for that revocation. Therefore, we reverse the decision of the district court and remand the case to that court with instructions that it vacate the AFT's revocation of New Banner's licenses to deal in firearms." (Petitioner's Appendix, pp. 9a-10a)

By allowing the states to trigger the Act by deciding which crimes will carry the possibility of a sentence in excess of one year under 18 U.S.C. § 922(g) and (h), the

spectre of offending the equal protection clause is unavoidable. That is where the tire hits this road because the citizens of various states are left under one law in different positions. Surely, this was not the intent of Congress; to intentionally, or even inadverdently, bring about such an incongrous and deplorable condition.

Petitioner seeks comfort in *Bergeman* but should gain no asylum there nor find improvement of his posture because there is is stated:

> "In the absence of an expression to the contrary, Congress generally intends federal criminal law to receive a uniform application." *United States* v. *Bergeman*, 592 F.2d at 534.

Jurisdiction of the district court was based on 18 U.S.C.A. § 3231. Jurisdiction of the Circuit court was based on 28 U.S. C.A. § 1291.

There Defendant was sentenced to five years in the Idaho State Penitentiary,

reduced by State Court to serve four months in County jail, pay $1,000.00 fine, court costs, and serve the balance on parole. Four years later the probation officer petitionerd the State Court and obtained an Order discharging Defendant from further probation and dismissing the charges against him. Defendant then challenged the Federal indictment for violation of 18 U.S.C.A. § 922(h)(1) on the ground he had not been convicted. Of course, the Ninth Circuit found such claim untenable, if not absurd. For Petitioner here to rely on such a weak reed is equally untenable and absurd, at least to the point of false analogy. The situations are entirely different and incomparable. Little wonder Judge Takasugi entered such a strong and biting dissent. There the expunction was not authorized by statutory law and was partial at best. One cannot rewrite

history. "The moving finger writes, and having writ moves on; nor all your peity nor wit lure back one half a line nor tears wash out one half line" (to paraphrase the Rhubiat).

These are federal questions indeed operating on state and federal planes on non-intersecting lines.

It is elementary that to have a valid conviction there must intersect (a) guilty plea, (b) acceptance thereof by the Court, and (c) imposition of sentences. State Courts have a perfect right to lay matters upon the shelf. Thousands of federal and state courts, while attempting to comply with Federal Rule of Criminal Procedure II, have refused proffered "guilty pleas" on close questions usually involving guilt and innocence and/or voluntariness.

To follow Petitioner's logic would lead one to conclude the absurdity that one

moving for a new trial on grounds of after discovered evidence, obtaining a retrial, and subsequent acquittal would leave them dangling on the enigma of a conviction. This is ludicrous.

Again, 18 U.S.C. § 927 provides:

> "No provision of this chapter shall be construed as indicating an intent on the part of Congress to occupy the field in which such provision operates to the exclusion of the law of any State on the same subject matter, unless there is a direct and positive conflict between such provision and the law of the State so that the two cannot be reconciled or consistently stand together."

This surely is part of the statutory scheme and should be brought into play here. Federal definitions of "convicted" (here we don't have even that) are not incompatible nor irreconcilable with State expunction statutes. Quite the contrary, State expunction statutes when read in conjunction with § 922(h)(1), help to bring the word "convicted" into focus. If Congress

intended the wretch's fate to hang on State definitions (which is undeniable here), it surely would be anomolous, even paradoxical, to suppose it did less intend to rely on State judicial action authorized by State statute.

To suggest "differing State by State triggering of the identical federal criminal law" comports with neither national uniformity nor equal protection of the laws. Such is sheer sopistry. It makes a travesty of the law.

If Congress intended national uniformity and equal protection, it should have described those crimes subjecting individuals to the enigmas of § 922(h)(1), rather than relying on a hodge-podge of vague State laws and at least have warned of the inapplicability of the State expunction statutes. Analogizing the non-recognition of State expunction laws to deportation

statutes as was done in *Bergeman* simply fails to appreciate disparate powers from which the varying State statutes arise and offends the United States Constitution equal protection clause.

The Youthful Corrections Act is by federal legislative design an expungement statute *per se*, and the word "convicted" cannot be read into it. Neither should it as to 18 U.S.C. § 922(h)(1), in the absence of express provision to the contrary. The public policies of second-chance removal of enigmas attending felonies and rehabilitation are the same. See *Cassity* v. *United States*, 522 F.2d. 1320 (6th Circuit).

Petitioner (p. 11) then attempts to shore up such weakness by throwing in *Huddleston*, the pawnbroker case off Ninth Circuit. That case was concerned with the terms "acquisition", "sale", "or other disposition" as being correlatives under

Sec. 922(a)(6) of The Gun Control Act.

Petitioner removes from that text the following:

> "When Congress enacted [18 U.S.C. 921 *et seq.*], it was concerned with the widespread traffic in firearms and with their general availability to those whose possession thereof was contrary to the public interest. ***The principal purpose of the federal gun control legislation, therefore, was to curb crime by keeping "firearms out of the hands of those not legally entitled to possess them because of age, criminal background, or incompetency." " (Petition, p. 11)

While conceding such language is found in Justice Blackman's Opinion, try as it may, Respondent fails to comprehend its relevance to Petitioner's (here) Question presented. It makes good window trappings, but frames the wrong window. The cases cited therewith are likewise incomparable as we shall presently see.

Huddleston, unlike Kennison, "knowingly" made the false statement. This is the very

opposite of the case *sub judice*, as demonstrated under Arguments 1, 3, and 4 *supra* herein, and from the merest reading of the two cases. Suffice it to say "pawnshop redemption," following commiting a felony and knowingly falsely answering the questions on an application for a license are within the ambit of the conduct proscribed.

Perhaps, however, as Justice Douglas' dissenting Opinion therein predicts, *Huddleston*'s "break with history" will one day be rectified. As his Honor observes (at 834): "It is therefore odd to think of the 'acquisition' occurring when he redeemed his own gun from the pawnship." Congress' failure to define "convicted" in the Gun Control Act, as Justice Douglas footnotes[1], however, is worthy of note.

---

[1] "...For application of a law that sends people to prison for years where Congress has not made it clear they should be there,

This, at least, would have made the irrelevancy more interesting and attempt to color an otherwise drab argument having nothing (even in black and white) to do with the question postulated.

Similarly, *Benson* (p. 12, n. 3) (sentenced under State of Illinois Court for possession of controlled substances to 30 month probation) attempted to plead conditionally guilty to violation of 18 U.S.C. § 922(h)(1). His plea was thrown out of Circuit and he was subsequently tried to a Court and jury. Convicted, he was sentenced to 5 months probation. Benson contended to the federal Courts his earlier State conviction satisfied the "prior con-

---

United States v. *Bass, supra,* at 346, is only another device as lacking in due process as Caligula's practice of printing the laws in small print and placing them so high on a wall that the ordinary man did not receive fair warning...." *Huddleston* v. *United States,* 415 U.S. 814 at 834.

viction element" of § 922(h)(1). The State Court had ordered that Benson's plea be "received and accepted." The facts there are far from here. Heavens, he was subsequently tried to the Court and jury who found him guilty.

Therefore, there can be no quarrel, quibbling or doubt *Benson* was "convicted". The Circuit Court felt *Benson* was controlled by *Bergeman* which, as shown above, is an equally inappropriate vehicle to carry the argument advanced here.

It is well settled that "unless Congress conveys its purposes clearly, it will not be deemed to have significantly changed the federal-state balance." *United States* v. *Bass*, 404 U.S. 336, 349, 92 S.Ct. 515, 523, 30 L.Ed.2d 488, 497 (1971). Thus, in the absence of a clear Congressional intent to the contrary, we ought to look at the state definition of "conviction" in the

application of § 922(h)(1) when the "prior" conviction was one of State law. See *United States* v. *Bergeman, supra* (Takasugi dissenting). See also "Conviction Defined", 40 J. State Bar of Calif. 36 (1965).

Since the Federal District Court in *Benson* found he was prosecuted under Sec. 410 of the Illinois Food and Drug Law — a deferred prosecution statute (Majority Opinion N. 2) the Illinois Court never did enter a judgment of conviction against him! When that matter was argued to the Ninth Circuit, the Government so conceded! Thus, this situation too should be distinguished from that case.

Here too, the conviction (arguendo, denied) was erased. When a state conviction is expunged by a state, no "conviction" remains or there is in neither law nor fact a "conviction". This is, therefore, albeit a federal question an officious

and wrongful usurpation of state powers reserved to them under the 9th and 10th Amendments of the Federal Constitution.

It was argued in *Garcia-Gonzales* v. *Immigration and Naturalization Service*, 344 F.2d 804 (9th Circuit 1965) the adoption of State definitions, including expunction or deferred prosecution provision, would lead to an uneven application of the law, depending on the "vagaries" of state law. Yet, there can be no uniformity since, according to the very language of § 922(h)(1), a person is within the scope of the statute only when convicted "in any Court of a crime punishable by imprisonment for a term exceeding one year."

Because the States are free to define the elements of a crime and to determine the penalty, the length of the sentence for any crime may, and often does, vary among the states. Thus, as noted with all

this by Judge Ely in *Benson*, an individual in one state who has committed a crime may find himself within the ambit of § 922(h)(1) while one commiting the identical crime in another state (the exact situation obtaining in the case *sub judice*) may not be even within the compass of the federal statute. It is, therefore, troubling that state systems of sentencing can comport with any theory of national uniformity while ignoring state expunction and deferred sentencing statutes. This gets heavily into geographical due process which simply is not due process, depending entirely and solely on where defendant was convicted. *Kelly* v. *Immigration and Naturalization Service*, 349 F.2d at 475.

Deferred prosecution and expunction statutes are based on legitimate state policy concerns: to deter recidivism and promote full rehabilitation of citizens.

This Honorable Court is being asked to place its imprimatur and drive the final nail in the casket of permitting states through their local judges - proximate to the scene and familiar with the mores and customs of their citizens - to determine the full civil and criminal sanctions which should attach. See "Conviction Defined," *supra*. Recently, Chief Justice Warren, among others, has deplored federal intrusion and the growing tendency to isolate the Federal Court policy of abstemption in favor of State action to fashion and pioneer such more effective programs.[2]

Petitioner really reaches in holding on to *Scarborough* (Petition, p. 15) who was found guilty by a jury in Virginia State Court to narcotics violation of State law.

---

[2] This is also the program of the present federal Executive, i.e., return States to their own rights and responsibilities. Will Justice Douglas' footnote, *supra*, prove prophecy fulfilled?

He contended since his State narcotics offence occurred several years after weapon shipped in interstate commerce; a conceded fact, resulting in federal court directed virdict on weapons charge on ground he had no longer even possessed the weapon by the time of his narcotics conviction. The Fourth Circuit (539 F.2d. 331) affirmed and this Court granted certiorari (429 U.S. 815 (1976)) in deference to the apparent split along the circuits as to the question postulated there, *i.e.*, can The Gun Control Act reach the mere possession sans showing of interstate nexus.[3] To be perfectly clear, the Fourth Circuit there held only that it does not matter when the interstate nexus of shipment is established, and then presumed that it did prior to the state

---

[3] There was no evidence the weapon had traveled in interstate commerce prior to the State felony. The Fourth Circuit finds support with the 6th and 10th circuits while the 2nd and 7th disagree. The 8th, 9th and 5th occupy a netherland.

trial which it held sufficient.

Surely all reasonable men will agree that such a narrow context should not be broadened as Petitioner now urges. As Justice Marshall, speaking for a majority, there reasoned, Congress, in enacting § 922(h) employed the present perfect tense in prohibiting a firearm "which has been shipped." That Court felt bound by *Barret* (Petition, p. 12) which held the Congress clearly, by choice of tense, "denoted an act which had been completed." *Barrett* v. *United States*, 423 U.S. at 216.

No one can argue with the logic involved, but what possible nexus could that have to the case under consideration? None, of course.

Logical as *Scarborough* seems, Justice Stewart, in dissent, it appears came near the mark involved here and and in a genre of reasoning compatible to Fourth Circuit

here. Justice Stewart carefully points out that until the felony conviction, Scarborough's possession of the four guns was perfectly legal, but under the present Court construction (there) of 18 U.S.C. § 1202(a)(1), he was automatically guilty of a federal felony *eo instante* years before receiving such guns when he had been convicted by the State. This resulted in a flagrant inconsistency with the time-honored rule of lenity necessary to the construction of federal criminal statutes, *Rewis* v. *United States*, 401 U.S. 808, 812; *Ladner* v. *United States*, 358 U.S. 169, 177-178; *Bell* v. *United States*, 349 U.S. 81, 83; *United States* v. *Universal C.I.T. Corp.*, 344 U.S. 218, 221-222.

One day, hopefully, this superior logic will be vindicated. The Act covers "[a]ny person who...has been convicted...of a felony and who receives, possesses or

transports...any firearm...." Plainly, pellucidly, the acts of receiving and transporting are prohibited only if they occur after Defendant's conviction. The Court, respectfully, needs a grammarian advisor.

The legislation obviously was designed to prevent a convicted felon from coming (*ad futuro*) into possession of a weapon after his conviction. Otherwise, we are looking at a *nunc pro tunc* trap set to automatically go off, a proposition found nowhere in such legislation.

Senator Long, the drafter and sponsor of § 1202, stated: the statute "places the burden of punishment on the kind of people who have no business possessing firearms in the event they come into possession of them." 114 Cong. Rec. 13869 (1968). Later, he added that otherwise § 1202(a) "would deny every assassin, murderer,

thief (in some states) and burglar...the right to possess a firearm in the future ...." 114 Cong. Rec. 14773. Lenity should have been applied.[4] The fault, though, lies at the floor of Congress, so often trapped into the use of improvident language or failure through sins of omission to make itself "perfectly clear" as we say in the classics. To derive criminal outlawry from ambiguous implication flies in the face of our system of jurisprudence. See *Universal C.I.T., supra.*[5]

---

[4] Under this construction, for example, a bookkeeper who owns a hunting rifle and who later commits embezzlement will, immediately upon his embezzlement conviction, also be guilty of violating § 1202(a). At oral argument the Government agreed that such a person should have a reasonable time to relinquish possession without being automatically in violation of the statute, and suggested that prosecutorial discretion would take care of the problem. Proper construction of a criminal statute, however, cannot depend upon the good will of those who enforce it.

[5] Contrary to the Court's suggestion, this reading would not allow a person "to go out in the period between his arrest and conviction and purchase

Sinking, Petitioner then stretches for *Arrington* (Petition, p. 18, n. 10, Fifth Circuit). This is a later (1980) classical example of his desperation which is immediately obvious. *Arrington* was convicted of eight counts of unlawful possession of firearms in Texas Federal District Court.

Notwithstanding the incontrovertibility of his prior felony conviction, Arrington claimed he no longer bore the onus of his conviction and, consequently, should not have been charged. His conviction had been expunged under Federal Youth Corrections Act, 18 U.S.C. §§ 5005-5026 (1976).[6]

---

and stockpile weapons with impunity." *Ante*, at 576. Title 18 U.S.C. § 922(h) makes it unlawful for any person who is under indictment for a crime punishable by imprisonment for a term exceeding one year to receive any firearm or ammunition that has been shipped or transported in interstate or foreign commerce.

[6]Pertinent parts of the Federal Youth Corrections Act, 18 U.S.C. §§ 5005-5026 (1976), provide as follows:

His claim was vindicated and the conviction as to that was thrown out, but upheld on marijuana possession charges. The Circuit Court found the other charges, in light of the Youthful Offenders Act, incredible, holding the Government has no right to second-guess the trial judge, citing *Minshen* v. *United States*, 410 F.2d

---

§ 5010. Sentence

(b) If the Court shall find that a convicted person is a youth offender, and the offense is punishable by imprisonment under applicable provisions of law other than this subsection, the court may, in lieu of the penalty of imprisonment otherwise provided by law, sentence the youth offender to the custody of the Attorney General for treatment and supervision pursuant to this chapter until discharged by the Commission as provided in section 5017(c) of this chapter; or

§ 5017. Release of youth offenders

(c) A youth offender committed under section 5010(b) of this chapter shall be released conditionally under supervision on or before the expiration of four years from the date of his conviction and shall be discharged unconditionally on or before six years from the date of his conviction.

§ 5021. Certificate setting aside conviction

(a) Upon the unconditional discharge by the Commission of a committed youth offender before the expiration of the maximum sentence imposed upon him, the conviction shall be automatically set aside and the Commission shall issue to the youth offender a certificate to that effect.

396, 397 (5th Cir. 1969). Accord, *United States* v. *Purgason*, 565 F.2d 1279, 1280 (4th Cir. 1977); *United States* v. *Fryer*, 545 F.2d 11 (6th Cir. 1976); *United States* v. *Vice*, 562 F.2d 1004 (5th Cir. 1977, Cert. denied 435 U.S. 951, 98 S.Ct. 1578, 55 L.Ed 2d 801 (1978), citing *Fryer* with implicit approval, and *Lewis* v. *United States*, 445 U.S. 55, 100 S.Ct. 195, 63 L.Ed 2d 198 (1980). "Giving a youthful offender a second chance to live free of the lifelong ignominy of a criminal record." *Dorszynski* v. *United States*, 418 U.S. 424, 432-35, 94 S.Ct. 3042, 3047-3048, 41 L.Ed 2d 855 (1974) and innumerable others found at page 1124 including 1st Cir. (1972).

Fryer, supra, is in harmony with *Cassity* v. *United States*, 521 F.2d 1320 (6th Cir. 1975) which states:

> "We conclude that Congress, in enacting § 922(a)(6), intended that a person convicted of a crime truth-

> fully disclose that fact when purchasing a firearm, even if such conviction is later found to be constitutionally infirm, at least where the conviction has not prior thereto been declared invalid or otherwise set aside." 521 F.2d at 1322.

Petitioner likewise makes a faulty choice in relying on *Jerome* (Petition, p. 18), who in 1943 caused the proposition that whoever enters a federal bank with intent to commit a felony therein, violates § 2(a) of the Federal Bank Robbery Act, which defines "felony" as limited to offenses which are felonious under federal law and affect banks protected by that Act to be set in precedent.

Now he fails to explain how that could relate to this, thereby in no way qualifying his proposed question for consideration here.

This Court disagreed with the Second Circuit which held the District Court find-

ing "felony" as used in Sec. 2(a) thereof included banks chartered under State law using the following language.

> "But we must generally assume, in the absence of a plain indication to the contrary, that Congress when it enacts a statute is not making the application of the federal act dependent on state law. That assumption is based on the fact that the application of federal legislation is nationwide (*United States* v. *Pelzer*, 312 U.S. 399, 402) and at times on the fact that the federal program would be impaired if state law were to control. *Seaboard Air Line Ry.* v. *Horton*, 233 U.S. 492, 503. When it comes to federal criminal laws such as the present one, there is a consideration in addition to the desirability of uniformity in application which supports the general principle. Since there is no common law offense against the United States (*United States* v. *Hudson*, 7 Cranch 32; *United States* v. *Gradwell*, 243 U.S. 476, 485), the administration of criminal justice under our federal system has rested with the states, except as criminal offenses have been explicitly prescribed by Congress. We should be mindful of that tradition in determining the scope of federal statutes defining offenses which duplicate or build upon state law." *Jerome* v. *United States*, 318 U.S. 104, 105.

It should be borne in mind that while that federal Act failed to duplicate or build on state law, The Gun Control Act does in Illinois and Idaho as well as South Carolina.

> "Moreover, the difficulty of giving "felony" in § 2(a) a state law meaning is emphasized when we turn to the law of such a state as New Jersey. There we find crimes classified as "misdemeanors" and "high misdemeanors." Rev. Stat. (1937) § 2:103-5, § 2:103-6. See *United States* v. *Slutzky*, 79 F.2d 504, 505. Uttering a promissory note with a forged endorsement is a "high misdemeanor." Rev. Stat. (1937) § 2:132-1b. The inference is strong that if Congress had designed § 2(a) to include the more serious state offenses committed in or against national or insured banks or only such state offenses as affected those banks (*Hudspeth* v. *Melville*, *supra*, p. 376), it would have used language which would have afforded that protection in all the states." *Jerome* v. *United States*, 318 U.S. 106, 107.

Again, in relying on *Thrall* v. *Wolfe* (Petition, p. 17, 19), (7th Cir. 1974) a directed verdict for Plaintiff was thrown out when the Governor of Montana pardoned

him after service of the better part of a sentence for felony assault, so he would be eligible for a firearms permit. The Federal Administrative Law Judge found the Governor's action without authority in law to remove a federal disability. The Internal Revenue Director's office agreed with the hearing officer and Plaintiff took them to U.S. District Court under 18 U.S.C. § 923(f)(3), where Plaintiff argued successfully the pardon blotted out the guilt.

The Circuit Court reversed, holding a State Governor had no right to blot out a federal disability; holding the President might, but as to a State, such would be extraterritorial.

Interestingly, we find in *Thrall* the precedent: Art. IV, § 1 of the Federal Constitution concerning full faith and credit as to public acts, records and judicial proceedings as speaking only to

the states. However, by federal statute 28 U.S.C. § 1738 , federal courts must also accord such full faith and credit.

It would seem, therefore, Petitioner (there) has erected a defense in behalf of this Respondent (at 315). *Thrall*, at page 316, footnote 4, states:

> "The consequences of a pardon expressly based on a determination of innocence need not be determined here. See *Richards* v. *United States*, *supra*, at 606. Similarly, this case does not involve the effect of a judicial order in the convicting jurisdiction setting aside the conviction. See *United States* v. *Hoctor*, 487 F.2d 270 (9th Cir. 1973). These situations entail considerations which could lead to a different conclusion." *Thrall* v. *Wofle*, 503 F.2d 313 at 316.

Footnote 8 at page 317 states:

> "In *Hoctor*, the majority held that a state statute under which certain convictions are expunged after satisfactory completion of probation relieved defendant of the disability in § 842(i). *Hoctor* may be distinguishable in that it involved a state court's judicially setting aside the original guilty verdict." *Thrall* v. *Wolfe*, 503 F.2d 313 at 317.

Barrett (Petition, p. 12) (6th Cir. 1975) is distinguishable from this cause in that that case involved only an interstate transaction. While the question of gubernatorial pardon was raised there, it was found "not presented here".

It would seem, therefore, that actually none of Petitioner's authorities are even presented here, taken in each case in the light most favorable to Petitioner's attempted question presented. Respondent, under the findings of fact by the sole trier of the fact, and on the whole record, simply fails to qualify as Petitioner's victim under any of the four categories within the compass of Sec. 922(h), however, Petitioner may warp or stretch the question or the argument. There is no rational connection between the facts proved following the matter presented to the trial court (Administrative Law Judge

Travis). For such lack and want of additional authority, Petitioner has no leg to stand on.

Even *Iowa Beer* (Petition, p. 20), on appeal from that Supreme Court, fails Petitioner. Indeed, it too fortifies only Respondent, holding:

> "He was given a deferred sentence; if he successfully completes his probation, the only record that the charge ever existed will be in the court administrator's office. Only if his probation is revoked will he be convicted, and that has not happened. See *State* v. *Farmer*, 234 N.W. 2d 89, 92 (Iowa 1975). Therefore, the court below was correct in finding there had been no conviction and that appellant did not have the power to suspend defendant's liquor license in this instance." *Iowa Beer and Liquor Control Department* v. *McBlain*, 263 N.W.2d 226.

N.L.R.B. set precedent (by this Honorable Court) Federal, not State, law governs determination on application for licenses by political subdivisions. The Sixth Circuit in 1971 held and such was affirmed by the Court, while a federal agency's con-

struction of a statutory term is entitled to great respect, it cannot be allowed to stand without warrant on the record, and in *N.L.R.B.*'s decision, the utility defendant was not a political subdivision, insulated from the National Labor Relations Act by exemptions mentioned on the face of that Act. The utility officials were appointed by, and answerable to, State officials and, therefore, were in fact and law public officials.

7. That, failing in the above, Respondent, concurring in Petitioner's averment "[m]ake it difficult, if not impossible, for the Bureau of Alcohol, Tobacco and Firearms to achieve predictable and uniform enforcement of the federal firearms laws." Respondent would show such alleged lack of predictability and/or uniformity expose the violation in this cause of the Equal Protection Clause of the United States Constitution.

This argument, in essence, is the same as portions of the argument on behalf of Question 6, *supra*. Respondent will not, therefore, burden this Court by redundancy thereon here.

8. That, failing in the above, this Honorable Court should deny the Petition as attempting to distort the record to submerge the facial violation of Due Process of Law Clause of the United States Constitution as found on the record by the trial officer.

> "DISCUSSION-Only one ground exists upon which the licenses in this case may be revoked and it is found under Section 923(e) of Title 18 of the United States Code. It is also mentioned in Section 188.73 of Title 27 of the Code of Federal Regulations. The law provides that after notice and opportunity for hearing the Secretary may revoke any license issued under this section if the holder has violated any provisions of Chapter 44, or any rule or regulations prescribed by the Secretary under this Chapter. We have uniformly held that there must be a willful violation. The regulation provides that whenever the Regional Regulatory Administrator has reason to believe that a licensee has "willfully" violated any provision of the Act or regulation, he may issue a notice of contemplated revocation. This amounts to the same thing and it is the beginning of revocation proceedings.
>
> "This case is very simple. I am totally convinced, from the evidence, that the Respondent did not willfully violate any provisions of Chapter 44 or the Regulations. When the Respondent stated that neither Mr. Kennison nor any of the others involved in the

company had ever been convicted of a crime punishable by imprisonment for a term exceeding a year it did not willfully commit a violation. At the time, the Respondent was convinced that these answers were absolutely correct. Even now, the Respondent feels that Mr. Kennison has not been convicted of any felony at all. The Respondent's officers are convinced and they have been told by their attorneys that although there was a guilty plea, there was never an entry of judgment and the case was dismissed. This they are told does not amount to a conviction of anything and if they were required to answer such a question again in writing they would again say "no." Accordingly, we can not, by any stretch of the imagination, call their actions willful.

"The Bureau of ATF apparently reasons that although we have not had a willful violation of the United States Code or the regulations, we have had a conviction. This is, under the prevailing court decisions, correct. Under the case law cited hereafter, Mr. Kennison can be considered a person who has been convicted of a crime punishable by imprisonment for a term exceeding one year. Although Mr. Kennison disagrees with this, he is wrong. Although he honestly believes that the Government is wrong, he is wrong and the Government is correct. He was in fact convicted of a felony. Accordingly, the Bureau of ATF could deny renewal of his application for

license and prevail. The reason for this is that under the law and regulations, it is unlawful for a convicted felon to ship or transport any firearms or ammunition in interstate or foreign commerce and it is also unlawful for a person such as Mr. Kennison to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce. These provisions are found in 18 U.S.C. 922(g) and (h). Under Section 923 (d)(1)(B), an application would be denied on the grounds that the applicant is prohibited from transporting, shipping, or receiving firearms or ammunition in interstate or foreign commerce under Section 922(g) and (h) of this chapter. The Bureau of ATF apparently feels that this also forms a basis to revoke a license. In other words, if the holder of a license is convicted of a crime punishable by a term of imprisonment exceeding one year why not revoke his license during revocation proceedings because the license, which must be renewed yearly, can not be renewed. Why merely follow form over substance and dismiss the revocation proceedings only to go into a denial proceedings soon there after, and take the license away by denial of renewal. Why not merely revoke it now and get it over with.

"The answer to the foregoing question is that a license holder must have due process and the law must be

followed. He must have notice and opportunity for hearing. He has had no notice that the license would be revoked merely on the grounds of a crime punishable by imprisonment for a term exceeding one year. The only notice he received was that revocation would be based upon the willful falsification of each of the applications by failing to say "yes." "(Petitioner's Appendix, pp. 50a-52a)

CONCLUSION

The petition for a writ of certiorari should be denied for all the reasons herein given.

Respectfully submitted.

JACK F. McGUINN
Attorney for Respondent

FEBRUARY 1982

Appendix

Office - Supreme Court, U.S.
FILED
FEB 22 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1180

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981

G. R. DICKERSON, DIRECTOR, BUREAU OF ALCOHOL, TOBACCO AND FIREARMS, PETITIONER

v.

NEW BANNER INSTITUTE, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

RESPONDENT'S ADDITIONAL APPENDICES

JACK F. McGUINN
Attorney

1610 Bull Street
Columbia, S. C. 29201
(803) 256-0600

ON THE BRIEF:
LEWIS C. LANIER
Of McGuinn and Lanier

TABLE OF CONTENTS

Page

APPENDIX A

Appellant's brief for United States Court of Appeals 1a

APPENDIX B

Petition to United States District Court 118a

APPENDIX C

Proceedings of hearing before Administrative Law Judge 122a

RESPONDENT'S APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 80-1141

NEW BANNER INSTITUTE, INC., APPELLANT

v.

G. R. DICKERSON, DIRECTOR, BUREAU OF ALCOHOL, TOBACCO AND FIREARMS, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA
ROBERT F. CHAPMAN, DISTRICT JUDGE

BRIEF FOR PETITIONER - APPELLANT

BACKGROUND

In order to understand this case, it will be essential to view the background of events leading thereto.

Earlier, in 1976, The New Banner Institute, Inc. had applied for and been granted licenses as dealers in firearms and related activities, both through State of South Carolina channels and the Department of the Treasury, Bureau of Alcohol, Tobacco and Firearms. The Stockholders and directors of The New Banner Institute, Inc. were carrying on in several enterprizes besides: conducting a Montessouri school, a periodical publication, "The New Banner, A Libertarian Journal", and engaged in various industries. It is their association in the publication of the ultra-conservative journal, which ultimately lead to the events involved in the pre-

sent lawsuit; primarily around its advocacy against gun control and in favor of strict constitutional governmental behaviour.

Later in 1976, the Nixon administration in an attempt to silence "The New Banner, a Libertarian Journal" through the F.B.I. and the secret service as well the Department of Treasury, Income Tax Division, and having failed in such approaches, adverted to the Department of Treasury, Bureau of Alcohol, Tobacco and Firearms to have their firearms related licenses revoked.

The New Banner Institue, Inc. then brought action in the United States District Court for South Carolina to prevent the forfeiture of their license under Title 26, Sec. 7402, Title 5 U.S.C., Sec. 552 for violation of the Freedom of Information Act, under Title 5 U.S.C. 552a

for invasion of their right of privacy, under Title 28 U.S.C., Sec. 1340, under Title 28 Sec. 1343 for invasion of their civil rights and under Title 28, Sec. 1355 for penalties and remedies to prevent their loss of rights to vote, and keep and bear arms, and under various other Constitutional provisions relating to due process and equal protection of the laws as well as under Title 28, Secs. 2201, et seq. for declarative relief.

In that suit, The New Banner Institute, Inc. sought to prevent such forfeitures and to survive in their property and means of livelihood. They alleged that since 1972 the government had engaged in unlawful means to silence "The New Banner, A Libertarian Journal" by misusing various agencies of the government to "get" people publishing editorials critical of them in their struggle to

silence those encouraging lawful tax avoidance as a means of protest, and to stifle groups opposing their efforts to make it unlawful to keep and bear arms, thereby chilling their rights under the First Amendment to the United States Constitution to argue in the debate concerning tax and government gun control policies.

In their discovery procedures, The New Banner Institute, Inc., had found such agencies of the Justice and Treasury Departments referring to their board of directors and stockholders as "those sick people", "militant types", and other such appellations and that such Federal Agencies were conspiring with local County and State taxing authorities to "get something on them", all of which had resulted in a number of tax hearings and lawsuits designed to sap the corporation of its financial

strength to fight back such determined governmental action to squelch, gag and stifle their criticism. In such lawsuit it was alleged that the government was bent on destroying them if necessary to accomplish such purposes to suppress all dissent and prosecute citizens critical of the tax system and the government posture for "law and order" under a guise to frustrate and silence opposition. Inter alia, the prayer of the complaint sought to enjoin the Department of Treasury from taking their licenses as dealers in firearms and related activities, which is the subject of the present suit.

The former lawsuit was settled, New Banner Institute, Inc., thought on the basis that the Bureau of Alcohol, Tobacco and Firearms would abandon their then current efforts to revoke such licenses and simply refuse to renew same at the

annual renewal period upon application therefor. If these circumstances are not related here, it would be difficult, if at all possible to consider, the record herein sought to be reviewed.

STATEMENT OF THE PRESENT CASE

In spite of such agreement, the Bureau of Alcohol, Tobacco and Firearms, after the lawsuit was dismissed, sought in December, 1976 to revoke such licenses on the grounds that David F. Kennison, who, as Board Chairman, had signed the application upon which the license had been granted June 17, 1976, because "The answers to question 24 (a) of the application reflected no person named as a responsible person of the applicant had been convicted in any court of a crime punishable by imprisonment for a term exceeding one year....Subsequent investigation developed that David Kennison on January 14, 1975, had been convicted in the District Court of Iowa in and for Des Moines County of the crime of carrying a concealed weapon and placed under deferred sentence. Mr. Kennison appears to

have satisfactorily completed the conditions of the deferred sentence and the record expunged." (Applicant's Ex. #9, A._____).

The notification went on to state that the crime of carrying a concealed weapon is under Iowa law a crime punishable by imprisonment for a term exceeding one year and with respect to the Gun Control Act of 1968, the deferred sentence although followed by expungement, constitutes a conviction. Citing U.S. v. Hartsfield, 387 F. Supp. 16 (M.D. Fla. 1975), and U.S. v. Locke, 409 F. Supp. 600 (D. Idaho 1976), and that since the application had been falsified thusly, New Banner Institute, Inc. was not entitled to a license. It made clear the revocation was under 18 U. S. C. 923 (f).

In connection with Mr. Kennison's entitlement to have the disabilities

resulting from such conviction removed, the Bureau cited 18 U.S.C. 925 (c).

Thereupon in January, 1977 (Applicant's Ex. #13, A._____), New Banner's attorney was advised that the records would be made available under the Privacy Act which had been requested December 15, 1976. The information subsequently furnished was of no meaningful use in that all the signatures, names and essential information requested had been deleted "pursuant to appropriate regulations".

Under date of January 6, 1977 (Government Exhibit #7, T._____) New Banner was notified that their license would be revoked under Chapter 44, Title 18 U.S.C. Section 923) for having made the false entry.

On January 7, 1977 in response to Mr. Kennison's and others' request for restoration of citizenship rights to vote

and to bear and keep arms, the Governor's office of Iowa stated an impression that such would be unnecessary as having not been affected because of the deferred sentence procedure obtaining in that jurisdiction. (Applicant's Ex. 14, A._____).

On February 28, 1977, New Banner was notified that a hearing on the contemplated revocation of their firearms license (sic licenses) would be held in accordance with Section 18 U.S.C. 923 (f) (2).

Such a hearing was held on April 6, 1977 with the issue being alleged violation of Sec. 924 (a) of Title 18 U.S.C. before Hon. Robert G. Thomas, designated as the hearing examiner (hearing officer). All of the formal government exhibits were stipulated: appointing the hearing examiner, the application of New Banner dated March 15, 1975 and May 10, 1976, the

copies of the licenses granted, notices of contemplated revocation and notices of revocation of licenses.

During this purely inter agency "trial", Government's Exhibit "G", authenticated copies of a letter from the Regional Director, of the Eighth Judicial District Court, Des Moines, County District Clerk, Burlington, Iowa and a response thereto were admitted, with attachments thereto, including proceedings on a motion of the State of Iowa to dismiss. Also introduced into the record were two sections of the Iowa Criminal Code, Sec. 695.2 and 695.3. The applicants introduced Section 927 of Title 18 U.S.C. providing that "no provision of this chapter should be construed as indicating an intent on the part of the Congress to occupy the field in which such provision operates to the exclusion of the

law of any state on the same subject matter unless there is a direct and positive conflict between such provision in the law of the state, so that the two cannot be reconciled or consistently stand together" Applicants further offered for judicial Notice Section 18-927 of the State of South Carolina Code of Laws, with the stipulation that these parties were duly licensed by South Carolina (Trial Transcript P. 6).

It was then stipulated in the record that the testimony of applicants would be they were advised by their counsel in Iowa that the actions by the courts there completely expunged or wiped the record clean and there existed no conviction in that State (Tr. P. 10). Thereupon, Sec. 789 A of the Code of Iowa and 789 A. (1) were judicially noticed, together with Sec. 789 A.6, which all indi-

cate that under Iowa procedure and law a plea is permitted to be entered conditionally upon the defendant keeping in good conduct for a specified time at the end of which THE COURT WOULD NOT ACCEPT THE PLEA and could discharge defendant with a clear record and without any conviction or sentence.

The hearing tribunal also took judicial notice of State of Iowa v. Roger Hannah, 179 N.W. 2d 503. It therefore became the focus and thrust of Applicant's position that no judgment of the Court of conviction was ever entered and frequently courts refuse to accept pleas tendered for limited purposes or situations, such as nolo contendere. (T. P. 12).

The hearing tribunal also accepted judicial notice of State v. Farmer 234 N. W. 2d 89, interpreting the statute in

question thusly:

> "The manifest purpose of the deferred sentence procedure is to permit a defendant to avoid otherwise inevitable convictions and a judicial record of the criminal charge by satisfactorily meeting the terms of probation, voluntarily undertaken before his guilt has been adjudicated and adjudication of guilt is judicial declaration of the defendant's legal guilt of the offense charged. Thus when judgment is deferred under 789 A. 1 of the code, speaking of the Iowa Code, the adjudiciation of guilt is deferred as well as the sentence." Tr. P. 13).

Applicants then entered for the record Iowa Code Section 19-2604, wherein the Court of Iowa held that (in Locke, infra, relied on by the government) a withheld judgment does not erase the conviction, UNLESS defendant satisfactorily completes the conditions and an approriate Order of judgment is entered. All voluntarily complied with by Applicants.

Applicants argued that in Locke the

defendant had not fulfilled the conditions and no judgment had been entered on him, whereas in Kennison the very opposite happened resulting in his exoneration under the "unless" clause of Sec. 19-2604 supra.

Applicants further distinguished Hartsville, infra, on the ground the Florida statute allowing expunction of a record after five years had not run so as to create that individual's eligibility, and, in Florida the Court had accepted the guilty plea and pronounced sentence BOTH.

Applicants, moreover (T. 16) distinguished Potts, infra, on the ground the Washington statute, although being similar to that of Iowa, added:

> "[p]rovided that in any subsequent prosecution for any other offense such prior conviction may be pleaded and proved and shall have the same effect as if probation had not been granted or the information or indictment dismissed."

which is absent from the Iowa Code.

The proceedings then focused (P. 17) on the constitutional provisions relied on by applicant; restraint of trade laws, rights of citizens to keep and bear arms pre-existing the constitutions of both the United States and Iowa as well as South Carolina, due process of law and the equal protection of the laws, as well as the abhorrence of punishing one a second time for the same offense. They further focused on the fact that under Iowa Law mere possession of a pistol is a felony, whereas in South Carolina the same conduct is a minor misdemeanor punishable by a $100,00 fine or 30 days imprisonment. Applicants argued it would not be appropriate to treat citizens of the United States similarly situate differently; that geographic due process demands that all alike be treated alike.

The Applicants further contended that allowing agencies of the Government cooperation through the F.B.I., C.I.A. and Treasury Departments including the Alcohol & Tobacco units and even the Internal Revenue, furnished a form of discovery unavailable to accused and others, and was also a violation of the Freedom of Information and Privacy Acts.

Applicants finally argued that to place a state of knowledge in applicants' minds about which the Courts disagreed and about which lawyers and judges disagreed would impose an undue burden of scienter necessary to determine wilfullness requisite to sustain the Government's action of alleged violation of 18 U.S.C. 924 (a).

Counsel for the government contended (T.20) that the SOLE issue "here today" is to determine whether or not this

license should be revoked on the grounds that in the application they failed to state that he has been convicted of a crime punishable by imprisionment for a term exceeding one year. To allow the Secretary to change in the rules after the referee (Judge Travis) has called Petitioners winners is like changing the rules after the game is over. To allow counsel even to argue something at a later day different from those "here today" is unconscionable.

Throughout counsel for applicants contended that in prosecuting this alleged revocation proceeding was in violation of the agreement entered into in good faith by applicants in settlement of their lawsuit mentioned in the "Background" material hereinabove; that such was a renege on the government's promise to await the renewal date when

the licenses expired that year. Such should operate as a form of estoppel. It is likewise unconscionable.

On May 19, 1977, Honorable Robert G. Thomas naturally found himself and his department innocent:

> "The Government's case was based on one count violation of the provisions of Chapter 44, Title 18, U.S.C., in that the licensee made a false representation in response to the question contained in Item 24 A of said application where in he represented that no responsible official of the company as listed in Item 21 of said application had been convicted in any court of a crime punishable by imprisonment for a term exceeding one year. Whereas a check of criminal records disclosed David F. Kennison had pleaded guilty in the State of Iowa to the charge of carrying a concealed weapon and was sentenced on January 14, 1975.
>
> "I have carefully considered all the facts and circumstances presented by the Government and the licensee at the hearing, the proceedings which were tape recorded. I

> find the Government's charge against the licensee was substantiated and the licensee's testimony and evidence did not refute the charge.
>
> "I therefore, conclude the licensee wilfully violated the provisions of the Gun Control Act of 1968 and does not qualify for licensing. I recommend the Notices of Revocation of License, dated January 6, 1977, of which the licensee was notified, stand."

On May 27, 1977 notice of revocation of the licenses were given by the Regional Regulatory Administrator who advised that a hearing for a review was available pursuant to Section 923 (f) (2) of Title 18 U.S.C. The filing of such a request seasonably operated as a supersedeas.

On the same day the same officer, Joseph D. Deviney, also their own employee entered his decision that pursuant to request by and notification to applicant, a hearing to review the revocation was held before Hearing Officer Robert G. Thomas on

April 9, 1977 and that he had considered all the facts and circumstances presented and found that David F. Kennison wilfully violated the Gun Control Act on one count. Such procedure could not be understood because §923 (d) (2) provides that the Secretary must approve or deny an application within the forty five (45) day period beginning on the date the application is received.

§923 (e) provides the Secretary may, after notice and opportunity for hearing, revoke any license issued if the holder of such license has violated any provision of this chapter (44). Whereas the notices and hearings within the Secretary's jurisdiction are competence related only to the single question of filling in a false application.

§923 (f) (1) provides persons whose applications are denied or a holder of a

license which is revoked shall receive a written notice from the Secretary stating the grounds of denial or revocation. Subsection (2) therefor provides that if the Secretary denies an application for, or revokes a license, he shall, upon request by the aggrieved party, promptly hold a hearing to review his denial or revocation and stay the action accordingly.

§923 (f) (3) provides that if after a hearing under Par. (2), the Secretary decides not to reverse his decision to deny or revoke, the aggrieved party may at any time within sixty (60) days after notice file a Petition within the United States District Court, and if the Court decides the Secretary was not authorized to deny or revoke, it shall direct the Secretary to take such action as may be necessary to comply with the judgment of the Court.

Therefore, pursuant to the Statute and pertinent regulations, Applicants' request for a hearing de novo was held April 9, 1977, and the decision thereon rendered May 27, 1977. Such was followed by a request for a formal hearing before an administrative law judge which was held September 7, 1977, Hon. Kenneth L. Travis, Administrative Law Judge, presiding.

§923 (e), as noticed at page 2 of Judge Travis' decision, has been uniformly interpreted so that the word "wilfully" is inserted between the words "has" and "violated", meaning that the Secretary may only revoke such a license if it is shown that the holder thereof has "wilfully violated" any provisions of Chapter 44, Title 18 of the United States Code. In other words, revocation does not lie for nonwillful, accidental, unintentional mistakes.

A concise and lucid summary of events involved herein is found beginning at Page 2 of judge Travis' decision. Judge Travis' conclusions of law that David Kennison's plea of guilty to a crime punishable by imprisonment for a period exceeding one year, represented "under the prevailing case law" a conviction within the ambit of Section 922 (g) and (h) of Title 18 notied however that there was "no evidence to support any conclusion that applicant has ever willfully violated any provisions of Chapter 44, Title 18 of the United States Code or the regulations prescribed by the Secretary under said Chapter." He therefore concluded that the notices of revocation should be dismissed "because Respondent prevailed by a preponderance of substantial evidence."

Judge Travis in his rulings on the

Government's Proposed Conclusions of Law, held that he knew of no case which held that a criminal court action such as that which involved Mr. Kennison in the Sate of Iowa was considered a conviction for all purposes. It appears, he ruled that the better argument is that it is considered a conviction. It should be carefully noted, however, he continued that it was THE INTENTION OF THE IOWA COURT AND LEGISLATURE to keep Mr. Kennison's record clean so that he would not be burdened with a conviction record in the even that he should encounter just such a situation as the one at hand.

Judge Travis in his ruling on the Applicant's Proposed Conclusions of Law, stated: "I have grave doubts about calling the Kennison plea 'a conviction'. I NEED NOT FACE THE ISSUE directly because this recommended decision should not be altered

regardless of whether there actually was a "conviction". If Mr. Kennison is ever (hereafter, interpolat ed) faced with such an issue for allegedly having violated 18 U.S.C. App. 1202 or 18 U.S.C. 922 (g) or (h), this question MIGHT BE (ad futuro) tested by the Courts. However, I doubt that any special agent of Treasury would make such an arrest, and, if he did, I doubt that any U.S. Attorney would authorize prosecution. With this in mind, if this represented a clearly defined violation of the firearms laws, there would have been a criminal prosecution, but obviously there was not. Mr. Kennison has admitted transporting a firearm interstated in 1975, after his plea of guilty to crime punishable by imprisonment for more than one year. Such an admission is part of the record in this file. IF THE GUILTY PLEA WAS A CONVICTION

why wasn't there a criminal prosecution? I conclude that the legal conclusions of the government regarding "conviction" are in doubt and the case has little or no prosecution appeal."

Judge Travis continued:

"Only one ground exists upon which the licenses in this case may be revoked and it is found under Section 923 (e) of Title 18 of the United States Code. It is also mentioned in Section 188.73 of Title 27 of the Code of Federal Regulations. The law provides that after notice and opportunity for hearing the Secretary may revoke any license issued under this section if the holder has violated any provisions of Chapter 44, or any rule or regulations prescribed by the Secretary under this Chapter. We have uniformly held there must be a willful violation.... "This case is very simple. I am totally

convinced, from the evidence, that Respondent did not willfully violate any provisions of Chapter 44 or the Regulations... the Respondent's officers are convinced and they have been told by their attorneys that although there was a guilty plea, there was never an entry of judgment and the case was dismissed....

[If] "He was convicted of a felony. Accordingly, the Bureau of ATF could deny renewal of his application for license and prevail. The reason for this is that under the law and regulations it is unlawful for a convicted felon to ship or transport any firearm or ammunication in interstate or foreign commerce and it is also unlawful for a person such as Mr. Kennison to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce. These provisions are found in 18 U.S.C. 922 (g)

and (h). Under Section 923 (d) (1) (B), an application would be denied on grounds that the applicant is prohibited from transporting, shipping or receiving firearms or ammunition in interstate or foreign commerce under Section 923 (g) and (h) of this chapter. The Bureau of ATF apparently feels that this ALSO FORMS A BASIS TO REVOKE A LICENSE. In other words, if the holder of a license is convicted of a crime ounishable by a term of imprisionment exceeding one year, why not revoke his license during revocation proceedings because the license, which must be renewed yearly cannot be renewed. Why merely follow form over substance and dismiss the revocation proceedings only to go into a denial proceeding soon thereafter, and take the license away by denial of renewal? Why not revoke it now and get it over with?

"THE ANSWER to the foregoing question is that a license holder must HAVE DUE PROCESS AND THE LAW MUST BE FOLLOWED. He must have notice and opportunity for hearing. HE HAS HAD NO NOTICE that the license would be revoked merely on the grounds of conviction of a crime punishable by imprisionment for a term exceeding one year. The ONLY notice he received was that revocation would be based upon the wilful falsification of each of the applications by failing to say 'yes'.....If the agency is to revoke a license based upon a felony conviction, the license holder should receive notice and have an opportunity for a hearing thereon. NO SUCH NOTICE HAS EVER BEEN GIVEN. I am also of the opinion that the conviction alone is not grounds for revocation."

Judge Travis then recited U.S. v. Hedgecoe, 420 F. 2d 458 (4th Cir. 1970) in

which a convicted felon executed these forms and stated he has not ever been convicted. However, he did not read the forms before signing them. The Court suggested, Judge Travis observed, that there was an insufficient showing that the defendant acted with the requisite knowledge. Judge Travis also noted that the word "conviction" means final consummation of the prosecution of the accused, INCLUDING THE JUDGMENT OR SENTENCE rendered pursuant to a court ASCERTAINMENT OF HIS GUILT. The statute, being criminal, must be construed strictly according to the lex forum. Judge Travis explicitly found the Court in Iowa never accepted Kennison's guilty plea which would be necessary for a conviction to follow.

Judge Travis stated he had discussed the case law at length without

drawing a conclusion.

Both parties sought review to the Respondent, Secretary, who affirmed, in part, and reversed, in part, the recommendations. He affirmed that Kennison (and therefore Appellant) had not willfully violated Sec. 924 (a), but held that the licenses should nevertheless be revoked on the ground Appellant was not qualified, ab initio, to the grant of a license under 18 U.S.C. 923 (d) (1) (B) which provides applications should be approved if the applicant [Sec. 923 (d) (1) (B) provides in the case of a Corporation applicant, any individual possessing, directly or indirectly the power to direct or cause the direction of the management and policies of the corporation] is not prohibited from transporting firearms in interstate commerce under Section 922 (g) and (h) which

provide it shall be unlawful if any person convicted in any court of a crime punishable by imprisonment for a term exceeding one year to deal in firearms.

Respondent in such review proceedings, as by certiorari, although a hearing was requested as to questions not raised on notice and trial, ruled that since Kennison had signed the application for appellant as Chairman of the Board and owned one-sixth of its capital stock, he, in fact, possessed the power to direct or cause the direction of the management and policies of the Corporation, and, since he had been convicted, again, challenged, of a crime punishable by imprisonment for a term exceeding one year, the licenses should be revoked as having been improperly granted ab initio. Appellant contended such an issue had never been noticed or even heard and had been the subject only

of a revocation, and not any granting hearing.

Following denial of a review of such revocation, Appellant seasonably applied for a review under Sections 18 U.S.C. 923 (f) (3) United States District Court for South Carolina on the ground Respondent had never given any notice or even a hearing on any question concerning revocation, except for alleged making of a false statement in alleged violation of 18 U.S. C. §924 and therefore such attempted revocation was "not authorized" within the ambit of the statue authorizing such review.

At Court, appellant contended its Board Chairman, Kennison, had not ever been convicted of a crime punishable by imprisonment for a term exceeding one year; that he had not violated any of the provisions of Chapter 44, Title 18, U.S.C.

§ 923 (3), et seq. and it was from the beginning eligible to receive the fire-arms licenses previously granted after careful consideration of its application by Respondent. It claimed it had never received any notice of revocation except for alleged violations concerned with filling out an application in violation of Sec. 923 (e), and the failure of the government to notify it of intended revocation on any OTHER ground was a violation of Sections 923 (e) and (f) (1), and therefore a denial of constitutional guaranties of (1) due process, (2) a fair and impartial trial, (3) an opportunity to be heard, (4) equal protection of the laws, (5) the right to keep and bear arms transcending the United States and states constitutions, (6) that the continuing view being asserted by the government of such chairman having suffered conviction

of a fellony was an unfair and unlawful astigmatization of Kennison personally and as a corporate official, (7) unlawful deprivation of property rights, and rights to (a) vote, (b) keep and bear arms, and (c) to the proprietary rights Kennison enjoyed in his reputation and privacy and on the official business of the Corporation which Appellant was obligated to protect.

Appellant's contention, on review, in fine, was that the trial Court, J. Travis, had found ONLY that apellant had not violated Sec. 923 (e), but had specifically abstained from determining Kennison had de facto or de jure been convicted of any crime, and under Sec. 922 (g) or (h) had correctly determined the issues sought to be introduced to the Secretary AFTER trial in brief on appeal for the first time under Sec. 18 U.S.C.

923 (d) (1) were violative of Sections 923 (e) and/or (f) (1) and on constitutional grounds.

Judge Robert M. Chapman of the United States District Court granted Respondent's motion for summary judgment agreeing (1) that Chairman of the Board Kennison had control of the Corporation as a matter of fact and law, and (2) Notices, hearings and due process had been fully supplied by Respondent. Appeal from such Order is the subject of this appeal.

QUESTIONS INVOLVED

1. Can the charging papers be amended by the Secretary on review or by appeal for the first time without any notice, opportunity to be heard or trial on the newly-so-begotten issues?
2. Does the Federal Statute, on its face, or as applied, violate the Fifth or Fourteenth Amendments by augmentation of an imputed knowledge of the law so broadly that one must know the law, changing as it does by the very experience of travelling from state to state or does it thereby unreasonably burden citizens right of mobility?
3. Does the Statute violate the due process clause of the Fifth or Fourteenth Amendments in its state by state application differently to

such a degree that an individual is not fairly warned as to what conduct is prescribed?

4. Was an officer of Appellant convicted of a felony?
5. Does the Statute, as applied, amount to a bill of attainder?
6. Was the Statute applied in this case in violation of the privileges and immunities afforded U. S. citizens?
7. Was the Statute applied in this case as to deprive U. S. citizens or persons due process and/or equal protection of the laws?
8. Should application of the Gun Control Act license revocation sanctions be limited to convictions of federal criminal charges to avoid denial of equal protection and due process guaranties to U. S.

citizens engaging in interstate commerce?

9. Is there a right to keep and bear arms from the common law protected by the Ninth Amendment to the United States Constitution? Or the 10th?

10. Does the presumption used in the Gun Control Act violate Fifth and/or Fourteenth Amendments by unconstitutionally shifting the burden of proof in criminal or civil cases?

11. Does the Gun Control Act inflict a penalty or a forfeiture abhorred in law?

ARGUMENT

1. Can the charging papers be amended by the Secretary on review or appeal, for the first time, without any notice, opportunity to be heard or or trial of the newly-so-begotten issue?

Judge Travis places this question in perspective for consideration by this Honorable Court:

> "The Bureau of ATF apparently reasons that although we have not had a willful violation of the United States Code or regulations, we have had a conviction. This is, under the prevailing court decisions, correct. Under the case law cited hereafter, Mr. Kennison can be considered a person who has been convicted of a crime punishable by imprisionment for a term exceeding one year. Although Mr. Kennision disagrees with this, he is wrong. Although he honestly believes that the Government is wrong, he is wrong and the Government is correct. He was in fact convicted of

a felony. Accordingly, the Bureau of ATF could deny renewal of his application for license and prevail. The reason for this is that under the law and regulations, it is unlawful for a convicted felon to ship or transport any firearm or ammunition in interstate or foreign commerce and it is also unlawful for a person such as Mr. Kennison to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce. These provisions are found in 18 U.S.C. 922 (g) and (h). Under Section 923 (d) (1) (B), an application would be denied on the grounds that the applicant is prohibited from transporting, shipping, or receiving firearms or ammunition in interstate or foreign commerce under Section 922 (g) and (h) of this chapter. The Bureau of ATF apparently feels that this also forms a basis to revoke a license. In other words, if the holder of a license is convicted of a crime punishable by a term of imprisonment exceeding one year why not revoke his license during revocation proceedings because the license, which must be renewed yearly, can not be

renewed. Why merely follow form over substance and dismiss the revocation proceedings only to go into a denial proceedings soon there after, and take the license away by denial of renewal? Why not merely revoke it now and get it over with?

The answer to the foregoing question is that a license holder must have due process and the law must be followed. He must have notice and opportunity for hearing. He has had no notice that the license would be revoked merely on the grounds of conviction of a crime punishable by imprisonment for a term exceeding one year. The only notice he (has) received was that revocation would be based upon the willful falsification of each of the applications by failing to say "yes", Mr. Kennison was convicted of a crime punishable by imprisonment for a term exceeding one year. Even in the May, 1977, decisions of the Regional Regulatory Administrator following the informal hearing as to the notices of contemplated revocation, it was found as follows: "I conclude that the licensee wilfully

> violated the provisions of the Gun Control Act of 1968, and is not entitled to a license." This was based totally on the alleged falsification of the answers to questions 24 (a) in each of the applications for license. If the agency is to revoke a license based upon a felony conviction, the license holder should receive notice and have an opportunity for a hearing thereon. No such notice has ever been given..."

Judge Travis (P. 11), in regard to Respondent's argument the Statute should be strictly construed, agreed and relied on U. S. v. Hedgecoe, 420 F. 2 458 (4th Cir. 1970), and State v. Farmer, 234 N.W. 2d 89 (Iowa 1975) which holds: "If the defendant is discharged from probation under Statute 789 A. 6, no conviction occurs in the strict legal sense because no adjudication of guilt is made. Citing State v. Hanna, 179 N.W. 2d 503 (Iowa 1970). He relied

also on State v. Wright, 202 N.W. 2d 72 (Iowa 1972) which discusses the Iowa law prior to the enactment of such statute deferring a finding of conviction or even accepting a plea. Courts are not bound to accept pleas and often refuse to do so.

18 U.S.C. §923 (h) is part of Title IV of the Omnibus Crime Control and Safe Streets Act of 1968 prohibiting previous convicted felons from receiving a firearm that has traveled in interstate commerce. U. S. v. Batchelder, No. 78-775, 99 S. Ct. 2198 (1979) which discusses the next question as well.

1. Does the Federal Statute, on its face, or as applied, violate the Fifth or Fourteenth Amendments by augumentation of an imputed knowledge of the law, so broadly that one must know the

law, changing as it does by the very experience of travelling from state-to-state or does it thereby unreasonably burden citizens' right of mobility?

Batchedler was convicted of violating Sec. 922 (h) of 18 U.S.C. for receiving a firearm which had traveled in interstate commerce and he was sentenced to five years. Such sentence was reduced to two years by the Seventh Circuit, but reversed by the United States Supreme Court on certiorari to the Seventh Circuit, which held that he was improperly sentenced to five years under Title IV of the Omnibus Crime Control and Safe Streets Act of 1968 of which 18 U.S.C. §922 (h) is part, the prosecutors having discretion in selecting which of two penalties to apply.

Justice Marshall found the Circuit Court of Appeals had erroneously relied

on three statutory principles of interpretation one of which was the doctrine of lenity, inasmuch as there were no ambiguities there to resolve. In resolving the question, the Court was faced with the question of apparent different penalties for identical conduct. 581 F. 2d at 633-634 (footnote omitted).

In our case, had New Banner been faced with the question of "conviction", which Judge Travis found was unnecessary to reach, and unconstitutional to try to reach (absent any notice or hearing thereon), it would surely have questioned denial of equal protection by the Statute §924 (g) and (h), itself, by permitting, and even requiring, the same identical conduct to be treated differently both civilly and criminally by a type of arbitrary application favoring

South Carolina citizens (Kennison being one) over those of Iowa, to which he had repaired for a brief purpose of recovering a run-away wife.

This raises grave implications concerning geographic due process, geographic equal protection, the applicability of laws of comity as well as constitutional provisions relevant thereto. It further raises the spectre of interference or burdening of the rights of all citizens of these United States to mobility, one of the very purposes for adoption and ratification of the pre-constitutional compacts. The Congress has buried in §§933 (g) and (h) of Title 18 U.S.C. seeds which will inevitably poison the tree of constitutional due process and equal protection as well as offend specific laws designed to protect interstate commerce against

undue burdens.

It obviously was not the intention of the Congress to suffer a criminal statute differently by its application to United States Citizens in their mobility rights freely exercised. The laws of Iowa provide carrying a concealed weapon is a felony. The laws of South Carolina provide the same conduct is merely a misdemeanor. The United States Supreme Court, following as it does trends set in the English Courts involving the same problems, would see the inherent inequity of punishing citizens similarly situate different on identical facts. This shocks the conscience.

3. Does the Statute violate the due process clause of the Fifth or Fourteenth Amendments in its state-to-state application differently to such a degree

that an individual is not fairly warned as to what conduct is proscribed?

A statute is invalid if it fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden. United States v. Harris, 347 U.S. 612, 617, 74 S. Ct. 808, 812, 98 L. Ed. 989 (1954); Conally v. General Construction Co., 269 U.S. 385, 391-393, 46 S. Ct. 126, 127-128, 70 L. Ed. 322 (1926); Papachristou v. City of Jacksonville, 405 U.S. 156, 162, 92 S. Ct. 839, 843, 31 L. Ed. 2d 110 (1972); Dunn v. U. S. _____U.S. _____, 99 S. Ct. at 2197.

Even where it is held that ignorance of the law is no excuse, to hold Appellant for Kennison's action would be harsh indeed. The Equal Protection Clause prohibits arbitrary or selective enforcement based upon unjustifiable

standards or arbitrary classifications. Oyler v. Boles, 368 U.S. 448, 456, 83 S. Ct. 501, 506, 7 L. Ed. 2d 446 (1962). This is a case where Appellant alleges improper motivations and considerations, even evil purposes, by an unparalled administration in the history of this nation first determined to abolish the free press and gradually gain complete domination.

18 U.S.C. §927 provides that no provision of this chapter shall be construed as indicating an intent on the part of the Congress to occupy the field in which such provision operates to the exclusion of the law of any state on the same subject matter, unless there is a direct and positive conflict between such provisions and the law of the State so that the two cannot be reconciled or consistently stand together. The laws

of Iowa, and even South Carolina are not in such conflict.

There is nothing irreconcilable or inconsistent between the applicable states' laws and the Federal Statute, provided the Federal Statute is applied and provided within the meaning of §§18 U.S.C. 927. Because of the divergence necessarily applicable to trigger or catalize the imposition of the provisions of Sections 922 (g) and (h), such provisions, as respects this appellant are clearly inoperative.

Legislative classification, such as that sub judice under Sections 922 (g) and (h), violate the equal protection and due process components of the United States Constitution in Amendment 5, providing against invidious discrimination without rational basis, and is impermissible when practiced on a

proper subject of 18 U.S.C. §927. See U. S. v. Ziegenhagen, D. C. Wis. 1976, 420 F. Supp 72.

The purpose of these sections is to dry up interstate supply of weapons for felons. U. S. v. Haddad, C.A. Nev. 1977, 558 F. 2d 968. Kennison may be a felon in Iowa, but he is not a felon in South Carolina? This is absurd. He is no felon in either State. His rights, and those of his cestui que trust (he being a fiduciary of the Appellant) cannot by mere pronouncement or by operation of a Federal Statute be dried up also. Congress did not intend to preempt the entire field. Kreshesky v. Codd, 1976, 391 N.Y.S. 792, 89 Misc. 2d 439. Kennison is simply not a convicted felon. No judgment has been rendered by a Court of competent jurisdiction nor sentence thereon pronounced. Everything

he did was voluntary and clearly intended to place himself under the intendment of the Iowa umbrella as observed by Judge Travis. The Congress has no authority, constitutionally or otherwise, to amend Iowa statutory law, or to allow federal agencies to interpret State law in a manner that only favors denial of a license in light of Iowa's clearly enunciated legislative purposes stated in their conditional plea statute.

Moreover, in Barker v. U. S., C.A. Kan. 1978, 579 F 2d 1219 it was held that once a person is convicted of a felony he is within the proscription against possession of firearms by a felon UNTIL that conviction is overturned, or expunged.

In U. S. v. Brzoticky, (10 Cir. 588 F. 2d 773 (1978), Chief Judge Seth with Judge Doyle concurring cited Lacey

v. People, 166 Colo. 152, 442 P. 2d 402, noticing that the Supreme Court of Colorado stated, in referring to pleas of nolo contendere and guilty pleas held there are admittedly differences in general purpose of each of such pleas, a guilty plea is an admission of guilt only for the case in which it is entered but there must be a judgment entered thereon and without a determination of guilt by the Court, there is no "conviction" under 18 U.S.C. §922. In that case the holding of the Federal Court was that such question must be determined by reference to STATE LAW. Judge Doyle foresaw dire consequences resulting by filing a concurring opinion warning that one could then be tried and convicted under 18 U.S.C. 922 (a) (6) (1970) on the charge of making a false statement and then again for Federal

possession pursuant to 18 U.S.C. §922 (h) (1970). He pointed out that the statute itself gives no definition, however the Supreme Court in Barret v. United States, 423 U.S. 212, 216, 96 S. Ct. 498, 46 L. Ed. 2d 450 (1976) HAS INTERPRETED IT AND IN DOING SO LOOKED AT THE LANGUAGE AND THE STRUCTURE of 922 (h) plus the manifest purpose of Congress. The Court did not view the state statutes, finding no ambiguity in the languages, and therefore refused to indulge in "uneasy statutory construction."

Finding no ambiguity in the statute, the Supreme Court said there was no reason to resort to the rule of lenity, a federal criminal law which declares that doubt as to congressional intent is to be resolved in favor of lenity for the accused. Bell v. U.S., 349 U.S. 81, 83, 75 S. Ct. 620, 99 L. Ed.

905 (1955). Judge Doyle went on to point out that the procedural doctrine that criminal statutes are to be strictly construed against the government.

He states: "Our court has said that the word "convicted" is to be given a nonrestrictive interpretation if the intent of Congress to limit firearms acquisition issued under 18 U.S.C. §922 (a) (6) (1970) is to be effected. Citing U.S. v. Place, 561 F. 2d 213, 215 (10th Cir.), cert denied 434 U. S. 1000, 98 S. Ct. 643, 54 L. Ed. 2d 496 (1977), but with the caveat that guilt must have been established. Then a most important observation follows:

> "A federal statute's meaning is to be determined in accordance with federal law, and the "degree to which a federal statute incorporates or refers to state law is a question of federal statutory construction." U.S. v. Pricepaul, 540 F. 2d 417, 424 (9th Cir. 1976). Also, in deciding

> whether a prior state conviction under 18 U.S.C. §922 (a)(6) and 18 U.S.C. §1202 (a) was constitutionally valid, federal constitutional standards were applied. Id." Construction of what constitutes a conviction that is admissible for impeaching a witness in a federal criminal case is not to be determined by the statutes or the decisional law of the forum state. U.S. v. Turner, 497 F. 2d 406, 407, (10th Cir. 1974), cert. denied, 423 U. S. 848, 96 S. Cr. 90, 46 L. Ed. 2d 71 (1975).

The Fifth Circuit in U.S. v. Dotson, 555 F. 2d 134 (1977) emphasized what was said in Lott v. U.S. 367 U.S. 421, 81 S. Ct. 1563, 6 L. Ed. 2d 940 (1961) about a final adjudication of guilt being withheld and not being made. All that the Supreme Court held in Lott, however, was that a guilty plea (nolo) was a determination of guilt for the purposes of running of time to make the appeal. Four Justices thought that the plea itself was a judgment for the pur-

pose involved. It was pointed out in Brzoticky, supra, the problem of imposition of judgement was not present in that case, although a suspended sentence after a plea of guilty is a prior conviction under 18 U.S.C. 922 (a) (6), citing U.S. v. Beebe, 467 F. 2d 122, 224 (10th Cr. 1972). Judge Doyle then stated:

> "The expungement of the Colorado record by court order after the indictment here in question has not heretofore undermined the sufficiency of the prior conviction. Although all the cases appear to follow this line, so if a conviction is expunged by the state, that will nullify the federal prosecution. But this is not the only complication. There will be nothing but confusion in prosecuting offenses arising under this Statute in the 10th Circuit because of the differing rules in different states and the several rules that obtain within some jurisdictions, depending upon the circumstances..."

The issue was settled in U. S. v. Stober, 604 F. 2d 1274 (10th Cir. 1979). The Court of Appeals, on rehearing en banc, Seth, Chief Judge, held that defendant who had pled guilty in Oklahoma state court pursuant to Oklahoma Deferred Judgment Act under which proceedings are deferred before judgment of guilt is entered HAD NOT been convicted for purposes of this very Federal Statute prohibiting the receipt of a firearm by one convicted of a felony. This case seems conclusive of the issues of this appeal. There it was held that a Federal court should follow state's determination as to whether state proceedings resulted in a "conviction" for purposes of a federal statute prohibiting the receipt of a firearm by a person who has been convicted of a felony, citing 18 U.S.C.A. §§ 922 (h), 924 (a).

Judge Seth held that the term "convicted in any court" as used in statute prohibiting receipt of a firearm by one who has been convicted in any court refers to a conviction by the court which tried the accused; if he has not been found guilty there by the judge there, he is not guilty for purposes of 18 U.S.C.A. §§ 922 (h), 924 (a). Judge Seth found that the plea of guilty must be construed in the light of the Oklahoma Deferred Judgment Act, which is practically verbatim in purpose to the Iowa Act sub judice. He held the plea was never accepted, judgment was withheld and proceedings deferred and such plea need never be accepted by the Court, citing Kercheval v. U. S., 274 U.S. 220, 47 S. Ct. 582, 71 L. Ed. 1009. There was no conviction there after a guilty plea and there is none here. Judges

Barrett, Circuit Judge, and William E. Doyle, dissenting. pps. 1278 Id.

Congress surely never intended to interfere with existing contractual relations or take away proprietary rights in Appellant's business in enacting the Gun Control Act. Kennison, Appellant, and all the stockholders, it should be bourne in mind it is respectfully submitted, have high stakes and a life investment riding on the outcome of this cause.

4. Was an officer of Appellant convicted of a felony?

Under this Stautory definition (Gun Control Act), only a defendant may enter a plea. Only a court of competent jurisdiction may accept that plea, or reject, that plea. This is traditional and fundamental law. See please 22 C.J. S. "Criminal Law", Sec. 422 (1), "Plea of Guilty", pps. 1167, et seq. U.S. v. Willis, D.C.75 F. Supp 628. In modern times Courts have been forced to reject pleas of every sort and for a variety of reasons, including the "I guess" variety. Shaw v. State 179 P. 2d 169, 84 Okl. Cr. 63, State v. Dorr, 184 N.W. 2d 673 (Iowa). U.S. v. Bednarski, C.A. Mass 445 F. 2d 364, and cases gathered in the supplement under n. 56.

The rule on such pleas is that such must be construed strictly and confined

to the narrowest limit consistent with intelligent interpretation of the effect thereof. U.S. v. 162 and 10/12ths Cases Containing Approximately 415 Proof Gallons of Distilled Spirits, D. C. N.Y. 138 F. Supp. 820, U.S. v. American Packing Corp. D. C.N.J. 113 F. Supp. 223.

There should not be nullification of State law by Federal legislation. The fact is that the Federal System has been quite consistent in preserving and respecting the State system even under the doctrine of Federal Supermacy. Nor should the Federal System ignore the purpose and intent of state laws, as here, under a conditional plea statute, when the Federal Agency alleges it is applying State Law! When the Federal agency here applies Iowa Law it must apply it totally and not only so much of such law that would permit a revokation or denial of

the license and ignore the remainder.

5. Does the Statute, as applied, amount to a bill of attainder?

The question of whether or not the Gun Control Act operates unconstitutionally as a bill of attainder would have been raised had notice and opportunity to be heard been afforded.

A bill of attainder is a legislative act which inflicts punishment without a judicial trial. There are scores of cases in 16A, C.J.S. Sections 452, 453, pps. 163 et seq. "Constitutional Law" on the question of the unconstitutionality of passage of bills of attainder either by the Congress or by the states. In pertinent part, the test states (P.165): a statute prohibiting the possession of firearms by one previously convicted of a felony there is no absence of trial, since such posses-

sion and previous conviction MUST BE JUDICIALLY ESTABLISHED. Citing People v. Camperlingo, 231 P. 601, 69 Cal. App. 466.

In this case there was no guilt established after trial. There was no trial on such issue. Kennison was, in fact, granted a continuance which after a certain period of time of proper behavior resulted in a discretionary dropping of the charges. This is surely analagous, at least, to a prosecutor dropping a prosecution on his own initiative or at his own discretion after reviewing a case looking for substantial justice as a fiduciary operating in a quasi-judicial role. If the government's position is allowed to be accepted here, there will be, in fact, Federal nullification of State law. Jury nullification has been known in our State and Federal

Systems, but this will be a novel turn or twist of events.

6. Was the Statute applied in this case in violation of the privileges and immunities afforded U.S. Citizens?

Amendment 1 to the United States Constitution provides that no State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States. The Constitution itself provides in Article 4, § 2 that the citizens of each state shall be entitled to all privileges and immunities of the citizens of the several states.

Such guaranty limits the power of a state, and the collective states, to exclude citizens of other states from the privileges granted to citizens of any other state. It would therefore seem to follow that Iowa would, at least, treat

citizens of South Carolina travelling through, no worse than under their home state laws for identical misconduct. The converse of this would also appear to be true, vis a vi: S.C. would, at least treat Iowa citizens travelling through no worse than its own. Otherwise, the underlying purposes in adopting the Constitution to encourage trade and commerce and intercourse of every kind would be frustrated and defeated, the very opposite from the intendment of the fathers. The doctrine of comity and the history of this Country testify this has been our heritage. See Konkel v. State, 170 N.W. 715, 168 Wis. 335.

The guaranty of the rights and immunities of a citizen insures to him the privilege of having those rights and immunities judicially declared and protected when such judicial action is pro-

perly invoked. Lawrence v. State Tax Comm of Mississippi, 52 S. Ct. 556 286 U.S. 276, 76 L. Ed. 1102, 87 A. L. R. 374, Whiteney v. Madden 79 N.E. 2d 593, 400 Ill. 185, cert. denied, 69 S. Ct. 55, 335 U.S. 828, 93 L. Ed. 382.

Surely no one would foolishly argue that the fathers intended to have its citizens victimized solely because of their exercise of rights of mobility. No such question, if it please the Court, was ever noticed or argued against New Banner or even one of its directors, Mr. Kennison. Surely, in view of their important property rights they would be given an opportunity to be, at least, heard thereon. Judge Travis found they were not given such an opportunity, but Judge Chapman specifically found, from what source it is not clear, they were. There was no fact finding either before

the Secretary or before Judge Chapman, both tribunes acting on the trial record established by Judge Travis. The government never maintained at any stage of the trial proceedings such issues as were raised by the Secretary and confirmed by Judge Chapman in overturning the trial Court.

The rights of the citizens to freely travel around and about the colonies existed prior to the adoption of the constitution, and in view of Amendment 9, were never revoked thereby. Rosehill Cemetery Co. v. City of Chicago, 185 N.E. 170, 352 Ill. 11, 87 A.L.R. 742. The burden here cast on Appellant is clear, unmistakable.

7. Was the Statute applied in this case so as to deprive U.S. Citizens or persons of due process, equal protection of the laws in regard to their property rights?

Equal protection to all is the basic principle on which justice rests under the law. Pierre v. State of Louisiana, La. 59 S. Ct. 536, 306 U.S. 354, 83 L. Ed. 757.

This has been held to mean that all persons subjected to state legislation shall be treated alike under like circumstances and conditions, both in privileges conferred and in liabilities imposed. State of Louisiana ex rel Francis v. Resweber, La. 67 S. Ct. 374, 329 U.S. 459, 91 L. Ed. 422; Smith v. State of Texas, Te 61 S. Ct. 164, 311 U.S. 128, 85 L. Ed. 84. There are two pages of citations in support of the text

at 16 A "Constitutional Law", p. 297, Sec. 502. C.J.S.

Classifications based on reasonable distinctions are valid, but those based on discrimination are invalid. These include the ownership and devolution of property, which is so basic as to require no authority for support in this text. While the 14th Amendment seems to apply only to action by State government, in this instance we witness a Federal Statute which can operate only in its application through, by and under different state laws. The Federal statutes' many defects include this arbitrary and unnatural, irrational application of and incorporation of State statutes of such a plethora of meaning and application as to violate, per se, the due process.

Without conflicting with the constitutional prohibition of denial of equal

protection of the laws, and equal protections afforded under the Fifth Amendment, legislation may be limited in its territorial application or operation to one or more cities, counties, or other areas, or different rules may be prescribed for distinct areas, where there is a "reasonable basis" for the limitation, classification or differentation, however, it is a cardinal principle of constitutional law that all persons similarly situate in the same place are to be treated alike. To treat a person differently as he travels from one location within the United States to another makes the Gun Control Act operate other than as intended by the Congress. Federal law should detail the conduct prescribed as well as the punishment imposed to withstand the rational relations test required by the Fifth Amend-

ment. These propositions have peculiar application in such a highly mobile and transitory population with such sophisticated means of moving about as in this century obtain.

Such classification whether by law on its black letter, or by application, is totally unreasonable and arbitrary. As to gun dealers, motor vehicle dealers, merchants of anything else, such law is applied so as to be fairly confiscatory or oppressive on whole classes of citizens similarly situate differently.

The Gun Control Act was enacted to reflect to a Federal concern on the trafficking in guns and ammunitions, and, as such, all citizens are similarly situated. The punitive aspects of the federal law should be related to federally prescribed criminal conduct which does not vary from State to State, meandering with migratory

populations, hence it can be seen there were no Federal Criminal law violations and consequently no federal sanctions specifically enumerated under the Federal Gun Control Act.

A license must not discriminate between residents and non-residents engaged in the same business. All citizens and residents of the United States similarly situate, should be treated alike. The cases on revocation without notice or hearing are collected under "Constitutional Law", C.J.S. 16 A, Sec. 659, pps. 1028, et seq. Laws non-discriminatory on their face may be grossly discriminatory in their application or operation. Griffin v. People of State of Ill., Ill. 76 S. Ct. 585, 351 U.S. 12, 100 L. Ed. 891, 55 A.L.R. 2d 1055, reh. den. 76 St. Ct. 844, 351, U.S. 958, 100 L. Ed. 1480 William v. Illinois, Ill. 90 S. Ct. 2018,

399 U.S. 235, 26 L. Ed. 2d 586. There is simply no rational distinction of why citizens of two different states living under the same Federal compact must be treated differently in identical circumstances. The U.S. Congress caused this by enactment of a federal law that vassilates impermissably as to proscribed conduct, according to geography with no rational purpose!

In the wake of Furman v. Georgia, 403 U.S. 952 (1970) finding unconstitutional the arbitrary application of the death sentence, the Fourth convicted under similar crimes. U.S. v. Bowswer, No. 73-2033, April 29, 1974.

Ordinarily state laws which are selective may be upheld upon a showing that there is a "rational relation" between the selection and a legitimate state policy. Distinctions in the right-

to-vote cases have shown a tendency to require a showing that the distinction is necessary to promote a "compelling state interest". It would be highly irregular, and there is some question of standing for a federal agency to be permitted to carry the burden, randomly, of showing "a compelling state interest" for Iowa's law concerning the punishment of carrying a concealed weapon, especially when Iowa considers the charges against Kennison as expunged and does not to this very day record the same in any office! See Kramer v. Union Free School Dist. No. 15, et al, 395 U.S. 621, 627, 23 L. Ed. 583, 589, 89 S. Ct. 1886. The right to operate a business and to own a firearm are no less rights which should be freed from distinctions of any kind. The right to keep and bear arms preceded the Constitution's adoption and

is a right reserved under the 9th Amendment as discussed infra.

8. Should application of the Gun Control Act license revocation sanctions be limited to convictions of federal criminal charges to avoid denial of equal protection, due process and property right guaranties to all U. S. Citizens engaging in interstate commerce?

The utter capriciousness flowing from the application of the Federal Gun Control Act, as it leaves federally imposed forefeitures or punishments to the discretion of various state legislatures, who can amend the Federal law at will thereby, are also at once an improper delegation of powers to the Executive branches of Federal Government and Legislative branches of State Government, which are obvious on the faces of this legislation as well as punctuated by its

application from state-to-state.

This legislation fails to meet any "compelling governmental interest" and it has no "rational basis" whatever. It cannot meet either test. When the law lays down an unequal hand on those who have committed intrinsically the same quality of offense and sterilizes one and not the other, it makes an invidious discrimination as if it had selected a particular race or nationality for oppressive treatment. Skinner v. Oklahoma, 315 U.S. 535, 541, 86 L. Ed. 1130, 62 S. Ct. 1110 (1942).

The Federal Gun Control Act fairly sterilizes or innoculates and shields citizens of South Carolina from its operation, while at the same time permits citizens of Iowa, and transient passers-through-there, to be indelibly marked with the fleur de lei of felony,

with all its awful implications aside from the Federal Gun Control Act.

Once the States have classified offenses, whether felonies or misdemeanors, it may not haphazardly pick and choose for other purposes without some rational basis or compelling State interest. Yet, this is what the federal agents are licensed to do from state-to-state arbitrarily and without rhyme or reason. In Roberts v. Collins, 544 F. 2d 168 (4th Cir. 1976), it was held unconstitutional to impose greater punishment for a lesser included offense than may be imposed for the greater offense; See also Davis v. Davis, 358 F. 2d 1226 (4rh Cir. 1968); Weems v. U.S. 217 U.S. 349 (1910). It would therefore seem that if a state cannot do it, neither should the United States.

While disfranchisement statutes

are not per se unconstitutional, in Richardson v. Ramirez, 418 U.S. 24 (1974), the Supreme Court held that a statute disfranchising felons was authorized by Section 2 of the Fourteenth Amendment. However, the facts and claims of this case are fundamentally different. This case involves unconstitutional discrimination in selecting victims for crimes of identical nature only by certain states. Such an attack was specifically left open in Richardson, where the Court upheld California's right to disfranchise for felony convictions, but remanded for further proceedings to determine whether a lack of uniform application constituted a separate denial of due process and/or equal protection. No controlling guidance seems available to resolve this question at the present time.

The quality of the crime of carrying

a concealed weapon is depreciated in South Carolina and is inferior by operation of this State law only. The quality of the act is identical to that which is made a felony in Iowa. Undoubtedly the Congress has left a kaleidoscopic quilt for determination of guilt under the Gun Control Act, by impermissibly permitting the states to qualify, or not qualify, thereunder as their State legislatures may from time to time elect under a fairly granted garden variety of local option thereon. This seems the very essence of wrongful delegation of powers, and license to violate the equal protection clause with impunity and do so legally under color of state law.

It is our position that while state federal courts may not make state policy decisions, neither should the national legislature. Federal courts may

provide narrowing interpretations of federal laws and regulations, but not those of individual states.

Federal courts "lack jurisdiction authoritatively to construe state legislation". U.S. v. Thirty Seven (37) Photographs, 402 U.S. 363, 369 (1971). Congress also should be held to lack jurisdiction authoritatively to enact, in effect, state legislation, or to incorporate it by reference when such effect so confuses the proscribed conduct that on travelling in interstate commerce one must consult legal counsel upon crossing each state border. The burden is too oppressive and unjustified entirely.

While it is true policy decisions are left to the states, Sloan v. Lemon, 413 U.S. 825, 834 (1973), surely it would be stretching the point to now hold

that Congress can make policy decisions beyond the intendment of the various State legislatures, or various State legislatures could put the shoe on if it fits their whim or fancy at given times.

The problem is not drying up "Saturday nite specials" from felons, but taking away a man's license to do business which is a property right constitutionally protected with due process of law. To allow it to be done in a kaleidoscopic fashion or on a local option basis clearly offends the equal protection clause.

Simply put, there is no policy line. This case would be an opportunity to draw a guide line, either set a policy which operates on all alike or declare the Gun Control Act in its black letter facially unconstitutional as a crazy quilt piece

of legislation designed to make sinful Iowa holier-than-thou South Carolina.

This is not a claim that the equal protection clause forbids a state from deciding in general that those convicted of certain crimes should be deprived of their licenses to do business. That argument was forclosed in Richardson v. Ramirez, 418 U.S. 24 (1974), which sanctions such under Section 2 of the 14th Amendment. Rather, the claim here is that here is an unconstitutional discrimination in selecting crimes involving the same identical conduct for additional punishment or forfeiture of property rights citizens have in their businesses. This was specifically left open in Richardson. Lack of uniform application of law still constitutes denial of equal protection. This proposition is totally analagous to the line of cases on dis-

franchisment and sterilization. The Federal government may not enact Gun Control Legislation which is pro tanto local option in its differing application from state to state which is being done. The peculiar application of the Gun Control Act to victims of the Iowa felony statute has no "rational basis" nor "compelling interest". We cannot have the same conduct venial sin in South Carolina and mortal sin in Iowa.

It bears repeating, carrying a concealed weapon in South Carolina is not merely trivial in the shadow (or light if you please) of the Gun Control Act, but nullifies the application of that Act. This is not just sloppy legislation, it is unconstitutional and haphazard and patently differing treatment for identical (mis)conduct. As Skinner v. Oklahoma, supra, shows, the classifications are to

be taken seriously, and states are not free to pick and choose willy-nilly. The point was more recently understood in Roberts v. Collins, supra, by this Honorable Court. Please see also Stephens v. Yeomans, 327 F. Supp. 1182 (D.N.J. 1970).

The record in this case shows clearly that even Iowa's Govenor shared a belief with appellant's Iowa and South Carolina counsel there was no conviction due to the conditional plea authorized under the Iowa Statute. But the Federal Government counsel and agency chose to cite other cases from other states to apply (or misapply) the penal aspects of the Gun Control Act in a manner different than Iowa has and from which it can apply same to South Carolina because we are the local option State in this context. The United States should be held to apply Iowa law as Iowa would in toto, not only

so much of Iowa law that would assure the United States of obtaining a forfeiture and securing a second opportunity to prosecute an individual. Its vindictive purpose of exceeded only by its tenacity, having now hounded these, as they branded them "sick people" whose newspaper they manipulated to be closed down, down now almost a full decade!

This is simply too much of enough.

9. Is there a right to keep and bear arms from the common law protected by the Ninth Amendment to the United States Constitution?

The rights guaranteed by the constitution are those specifically enumerated therein and those existing at the common law or by statute at the time the constitution was adopted. Craig v. Lane, 89 P. 2d 1008, 60 Idoho, 178; First National Bank of Boston v. Bellotti, Mass.

98 S. Ct. 1407, 435 U.S. 765, 65 L. Ed. 707, rehearing denied, 98 S. Ct. 3126 and those collected at 16 C.J.S. "Constitutional Law" P. 196 and supplement.

Natural rights are such as appertain originally and essentially to man -- such as are inherent in his nature and which he enjoys as a man independent of any particular act on his side. C.J.S. "Civil Rights" §§2, and cases cited in support of text. These rights include the right of personal liberty, the right of personal security, and the right to acquire and enjoy property. See also cases gathered at 16 C.J.S. "Constitutional Law", p. 975, n. 25 and in the supplement thereto.

The federal constitution contains provisions usually enumerated in the Bill of Rights as defined in 10 C.J.S. "Bill of Rights" p. 384, n. 66, et seq. which

guarantee the preservation of our natural rights against any invasion by the government. Bell v. Hood, D. C. Cal. 71 F. Supp 813; International Ass'n of Machinists v. Sandsberry, Civ. App. 277 S. W. 2d 776, error granted.

The very purpose of the Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials, and to establish them as legal principles to be applied by the courts. These fundamental rights may not even be sumbitted to a vote and do not depend on the outcome of any election. The constitutional guaranties negative any form of procedure which arbitrarily singles out any individuals or class and permits them to be dealt with in a manner arbitrarily or unreasonably different from that in which others

similarly situated are dealt with. People v. Lewis 31 N.E. 2d 975, 375 Ill. 330, cert. denied 62 S. Ct. 58, 314 U.S. 628, 86 L. Ed. 504.

The constitution is not the source of our personal rights. Our theory of government is that the people, in full possession of inherent, inalienable rights, have formed the government in order to protect those rights, and have incorporated them in the organic law as a shield against unlawful or unwarrantable interference by any department of government. The Courts are under oath to be watchful to protect our personal rights and cannot be made dependent on the favor of any agency or any court whatsoever.

All constitutional rights are co-equal and must be harmonized with each other; no one such right being permitted

to override or submerge another.

The right of personal liberty contains and consists in the power of locomotion, of changing situation, or removing one's person to whatsoever place one's inclination may direct without any restraint except by due process of law, and, in general, to live where one pleases and engage in any occupation one chooses. It frequently includes the rights such as the absence of arbitrary and unreasonable restraint on a person in the conduct of his career and business and the handling of his own property. Any violation of interference with the right of personal liberty may be resisted. It is a constitutional function of the American judiciary to protect life, liberty and property against all high-handed or capricious official invasion operating under whatever disguise or legal

form. It includes the right of each person to acquire and dispose of his property and his labor (which are his liquid sweat condensed into new form) by any lawful means and for the lawful purposes he chooses freely and to pursue any lawful business, trade, profession or calling in such manner as to him alone shall seem meet.

As noticed above, Appellant does not contend, for the reasons stated, that this case in its extensive meaning and import, results in the citizens' loss of right to keep and bear arms. This right exists, and pre-existed our Federal Constitution. 94 C.J.S. "Weapons", p. 472, Sec. 2 (a) and cases cited there.

This right is a general right and is sometimes said to be inherent and inalienable existing independently of constitutional guaranties. It is of a

nature as the public liberty and its preservation commended as lawful and worthy of protection. State v. Workman, 14 S.E. 9, 35 W. Va. 367, 14 A.L.R. 600.

It is not a right to bear arms on all occasions and in all places, but to use them in a way that is usual, or to keep them for the ordinary purposes to which they are adapted, as the defense of one's person or his castle or his property and the protection of his family and his state. People v. Zerillo, 189 N.W. 927, 219 Mich. 635, 24 A.L.R. 1115.

The word "arms" means such weapons as are adapted to the efficiency of the citizen as a soldier, such as rifles, shotguns, muskets and swords. U.S. v. Miller, Ark. 59 S. Ct. 816, 307 U.S. 174, 83 L. Ed. 1206 settled the question that this cannot be asserted as a right protected by the second Amendment absent a

showing of reasonable relationship between carrying such weapons and a well regulated militia, and in Tot, infra, reversed on other grounds all of which state the people have the right to bear arms provision refers to the people collectively and applied only to the right to bear arms as members of a state militia or other organization provided by law. This however, in no way limits the rights reserved to the States and to the people by the Constitution itself. At least that is what Articles IX and X seem to say:

> "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparge others retained by the people."
>
> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."

These amendments were proposed by Congress on September 25, 1789 and declared ratified on December 15, 1791. Constitutional grants of power to the United States are strictly construed. State v. Davis, 12 S.C. 528 (1879) reversed on other grounds in 107 U.S. 597, 2 S. Ct. 636, 27 L. Ed. 574 (1882). The people have the absolute inalienable right to properly bear arms for their own protection. See People v. Brown, 235 N.W. 245, 253 Mich. 537, 68 C.J. p. 8, n. 55, and cases found thereunder.

The Second Amendment, like those in the entire Bill of Rights, constitutes only a limitation on the power of the federal government alone.

10. Does the presumption used in the Gun Control Act violate Fifth and/or Fourteenth Amendments by unconstitutionally shifting the burden of proof?

Those aspects of presumptions of fact and law created in the Gun Control Act have not been challendged here because no notice or opportunity to be heard thereon were given.

The criteria for judging the constitutionality of a statutory presumption is set forth in Leary v. United States, 89 S. Ct. 1532 (1969). There is a presumption of validity, however, one test is whether there was a "rational connection" between the basic fact and the presumed fact. Mobile J. & K. C. R. Co. v. Turnipseed, 219 U.S. 35, 31 S. Ct. 136, 55 L. Ed. 78 (1910). Another is whether the legislature might have made it a crime to do the thing from which the pre-

sumption authorized an inference. Ferry v. Ramsey, 277 U.S. 88, 48 S. Ct. 443, 72 L. Ed. 796 (1928), and a third was whether it would be more convenient for the defendant or the prosecution to adduce evidence of the presumed fact. Morrison v. California, 291, U.S. 82, 54 S. Ct. 281, 78 L. Ed. 664 (1934).

However, in Tot v. United States, 319 U.S. 463, 63 S. Ct. 1241, 87 L. Ed. 1519 (1943), the Court singled out one of these tests as controlling. The Tot Court had before it a federal statute which, as construed, made it a crime for one previously convicted of a crime of coilence to receive any firearm or ammunition in an interstate transaction. The statute further provided that "the possession of a firearm or ammunition by any such person shall be presumptive evidence that such firearm or ammunition was

shipped or transported or received, as the case may be, by such person in violation of the Act." The Court, relying upon a prior decision in a civil case, held that the "controlling" test for determining the validity of a statutory presumption was "that there is a rational connection between the fact proved and the fact presumed." 319 U.S. 467, 63 S. Ct. 1245. The Court stated:

> "Under our decisions a statutory presumption cannot be sustained if there is no rational connection between the fact proved and the ultimate fact presumed, if the inference of the one from proof of the other is arbitrary because of lack of connection between the two in common experience. This is not to say that a valid presumption may not be created upon a view of relation broader than that a jury might take in a specific case. But where the inference is so strained as not to have a reasonable relation to the circumstances of life as we know them it is not competent for the

> legislature to create a rule governing the procedure of the courts. 319 U.S. 467-468, 63 S. Ct. at 1245 (footnotes omitted)."

Even today South Carolina's State Legislature and Supreme Court are engaged in a titanic struggle concerning the rule making powers of legislative ranch pertaining to matters solely within the competence of the judiciary. This raises an even broader question of the improper ursurpation or separation of powers doctrine. Nevertheless, Leary, continued, that Tot reduced to the status of a corolla-ry another test which has some support in prior decisions; whether it was more convenient for the defendant or the Government to supply proof of the ultimate fact which the presumption permitted to be inferred. The Court stated that "[t]he argument from convenience is admissible only where the

inference is a permissible one.." 319 U.S. at 469, 63 S. Ct. at 1246. The Court rejected entirely another suggested test with some backing in the case law, according to which the presumption should be sustained if Congress might legitimately have made it a crime to commit the basic act from which the presumption allowed an inference to be drawn. For example, it was argued in Tot that in order to regulate interstate commerce in firearms Congress might have prohibited possession of ALL firearms by persons who had been convicted of crimes of violence.

Let it be noted here, parenthetically, that Appellant is not attempting to argue that Congress had no authority, constitutionally or otherwise, to enact the Gun Control Act, but to the contrary, if the Congress does act, it must act totally under Federal Statutes as to the

conduct which will require punitive sanctions. To do otherwise arbitrarily applies the law and burdens the right of mobility. Presumptions of "Knowledge of the Law" is time honored, but the Gun Control Act extends the presumption in an arbitrary and capricious manner, because under that Statute, the Defendant is not presumed to have knowledge of the Federal Criminal Law, but also the State criminal law of ALL the States he may ever travel to, in or through. This presumption then is an unlawful, or, at least, an awful extension of the presumption. Surely such an argument under the Second Amendment as noted supra is foreclosed because the Supreme Court had held the word "people" there refers only to those "people" in the "Militia".

Applying the "rational connection" test, the Court held in Tot the presump-

tion to be unconstitutional, rejecting the contention that because most of the transaction or registration of ownership, it could be inferred merely from possession that an acquisition which did not meet these requirements must have been interstate, noting the alternative possibilities of unlawful intrastate acquisition and interstate shipment prior to the beginnings of state regulation.

The two subsequent cases in which the United States Supreme Court ruled upon the constitutionality of criminal statutory presumptions, U.S. v. Gainey 380 U.S. 63, 85 S. Ct. 754, 13 L. Ed. 2d 658 (1965), involving companion sections of the Internal Revenue Code dealing with illegal stills, and United States v. Romano, 382 U.S. 136, 86 S. Ct. 754, 15 L. Ed. 210 (1965) permitting a jury to infer from the defendant's presence of an

illegal still that he was "carrying on" the business of distiller "unless the defendant explains such presence to the satisfaction of the jury...26 U.S.C. §§ 5601 (a) (4), 5601 (b) (2)."

Gainey taught the presumption should be tested by the "rational connection" standard learned from Tot, but added that the process of making the determination of rationality is, by its nature, highly empirical and in matters not within specialized judicial competence or completely commonplace, significant weight should be accorded the capacity of Congress to amass the stuff of actual experience and cull conclusions from it. Applying these principles, the Court sustained the Gainey presumption, finding that it "did no more than accord to the evidence, if unexplained, its natural probative

force." d80 U.S. at 71, 85 S. Ct. at 759.

The presumption attacked in Romano was identical to that in Gainey except that it authorized the jury to infer from the defendant's presence at the still that he "had possession, custody or control" of the still. See 26 U.S. §§ 5601 (a) (1). That presumption is much like the one in this Gun Control Act. That presumption was ruled invalid because "carrying on" and presence at the site are very probably connected with an illegal enterprise, but absent a showing of defendant's function at the still, its connection with possession is too tenuous to permit a reasonable inference -- the inference of the one from proof of the other being arbitrary. To here hold that (a) because Kennison was a member of the Board of Directors and (b) owned

one-sixth of the stock, is entirely too tenuous to support a presumption that he is "in control" of the Appellant Corporation. In fact, it is almost absurd.

By this process of reasoning it comes clear that 18 U.S.C 923 (d) (1) (B) [referred to a page 2 of Judge Chapman's Order] (including in the case of a corporation any individual possessing, directly or indirectly the power to direct or cause the direction of the management and policies of a corporation) being prohibited from transporting or receiving firearms in interstate commerce under 18 U.S.C. 922 (g) and (h), goes too far in licensing a reasonable inference that Kennison did, in fact, have management control of Appellant corporation as a matter of law with no other scintilla of evidence. While Judge

Chapman characterizes this as "overwhelming evidence", Appellant submits it is arbitrary, unreasonable and even irrational.

It would be far more convenient for the Government to supply proof of the ultimate fact, if a hearing were even held. Indeed, the fact sought to be inferred is not even classified as a presumption in the Statute itself. The argument from convenience is admissible only where the inference is a permissible one. The process of arriving at such a judicial determination is highly empirical and in matters not within specialized judicial competence nor completely, much less, even commonplace. To amas such "stuff of actual experience and cull conclusions from it" is no more than sheer sophistry and an over indulgence in loose reasoning without rhyme or reason.

11. Does the Gun Control Act inflict a penalty or a forfeiture abhorred in law?

Yes. Anything is arbitrary which punishes by discrimination on account of race, religion, wealth, social position or class. Furman v. Georgia 92 S. Ct. 2726 (1972).

From the inception of the Republic, and long before then, there is evidence that the provisions of the English Bill of Rights of 1689, from which the language of the Eight Amendment was taken, was concerned with selective or irregular application and discriminatory penalties:

> "Following the Norman conquest of England in 1066 the old system of penalties, which ensured equality between crime and punishment, suddenly disappeared. By the time systematic judicial records were kept, its demise was almost complete. With the exception of certain grave crimes for which the punishment was death or outlawry, the arbitrary fine was replaced by a discre-

tionary amercement. Although the amercement's discretionary character allowed the circumstances of each case to be taken into account and the level of cash penalties to be increased or decreased accordingly, the amercement presented an opportunity for excessive or oppressive fines.

"The problem of excessive amercements became so prevalent that three chapters of the Magna Carta were devoted to their regulation. Maitland said of chapter 14 that 'very likely there was no clause in the Magna Carta more grateful to the mass of the people'. Chapter 14 clearly stipulated as fundamental law a prohibition of excessiveness in punishments:

> 'A free man shall not be amerced for a trivial offence; and for a serious offence he shall be amerced according to its gravity, SAVING HIS LIVELIHOOD: AND A MERCHANT LIKEWISE, SAVING HIS MERCHANDISE: IN THE SAME WAY A FILLEIN SHALL BE AMERCED SAVING HIS WAINAGE; if they fall into our mercy. And none of the aforesaid amercements shall be imposed except by the testimony of reputable men

of the neighborhood.'"

The English Bill of Rights, enacted December 16, 1689, stated that "excessive bail shall not be required, nor excessive fines imposed..." These words were the words chosen for our Eight Amendment and implanted into the Virginia Constitution of 1776 and those of Delaware, Maryland, New Hampshire, North Carolina, Massachusettes, Pennsylvania and South Carolina. 1 Thorpe 7 F. Thorpe, Federal & State Constitutions 3813 (1909).

Where harsh fines and punishments were authorized, they met with jury nullification. Any penalty, fine or forfeiture can be unfairly and unjustly applied. The vice is not alone in the penalty but in the process by which it is inflicted. It is inherently unfair to inflict unequal penalties on equally

guilty parties, or on any innocent parties.

The key word is that what the legislature may not do for all classes uniformally and systematicly, it may not do as to all classes alike. The classes here referred to are those congregations we call states. This is the rule of the judiciary, why should the Congress be different? The principles are identical. Why should citizens of South Carolina and Iowa, as instances, being both citizens of the United States be treated differently in the context of 18 U.S.C. 922 (g) and (h)? To constitutionally suffer such is purely arbitrary and discriminatory.

The Congress should be required to write its laws, especially its penal and forfeiture laws, even-handedly, non-selectively and non-arbitrarily, and see

to it that judges are required to not to apply general laws sparsely, selectively and spottily. This Statute is clearly unconstitutional both on its face and as practiced on its victims who may just happen to now come from states which have opted out or have used the built-in local option.

This Statute is pregnant in such discrimination which is incompatible with the idea of equal protection of the laws. In any event, any law which is non-discriminatory on its face may be applied as this one is, in a discriminatory manner violating the Equal protection Clause. Yick Wo v. Hopkins, 118 U.S. 356, 6 S. Ct. 1064, 30 L. Ed. 220.

The values and ideal embodied in our Constitutional philosophy and scheme of government are not always susceptible of precise definition, but one doesn't

have to be a chicken to smell a rotten egg. The second punishment visited and that punishment clearly contemplated in this rotten case are to clear and a present danger to further ignore. Time works changes, brings into existence new conditions and purposes and these principles, to be vital, must be applied as and when necessary. Vigilance is still the price of liberty. These government agents have been riding too long on the backs of Appellant's employees and stockholders. It's time to get off.

CONCLUSION

It is respectfully submitted that the District Judge suffered the continuing saga of oppression of Appellant and its stockholders. If oppression is countenanced, it diminishes the rights of the righteous and the wicked alike.

The charging papers were amended by the Secretary on review or appeal for the first time without any notice, opportunity to be heard or trial on such newly-so-begotten issues.

The Gun Control Act on its face and as applied violates the Fifth and/or Fourteenth Amendments by augmentation of an imputed knowledge of the law so broadly that one must know the law of each jurisdiction as one exercises his right of mobility.

The Gun Control Act fails to warn the individual as to exactly what conduct

is proscribed.

Kennison was not "convicted" in Iowa.

The Gun Control Act by its application is a bill of attainder.

The Gun Control Act, as applied here, violates the privileges and immunities afforded United States Citizens.

Appellant has clearly been deprived of equal protection, due process and the right to trial.

Ghe Gun Control Act is a burden on Interstate Commerce.

Citizens have a right to bear and keep arms under the Nineth and Tenth Amendments.

The presumptions planted in the Gun Control Act violate the Fifth and Fourteenth Amendments by shifting the burden of proof.

The Gun Control Act inflicts, on top of State criminal punishments, second and even third amercements and offends the Eighth Amendment by imposing penalties and forfeitures abhorred in law.

For any of these reasons the case should be reversed and the trial Court directed to require the Secretary to follow the law as it is announced and as found by this Honorable Court to be unconstitutional in those aspects herein allueded to.

All of which is most respectfully submitted,

LEWIS C. LANIER AND
JACK F. McGUINN
Attorneys for Appellant

Columbia, SC.
April 30, 1980

RESPONDENT'S APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

Civil Action No. 79-0439

NEW BANNER INSTITUTE, INC., PETITIONER

v.

G. R. DICKERSON, DIRECTOR, BUREAU OF ALCOHOL, TOBACCO AND FIREARMS, RESPONDENT

PETITION

Petitioner would show this Honorable Court:

1. That this Court has jurisdiction hereof under 18 U.S.C. §923 (f) (3) to review the decision of the Acting Director

of the Bureau of Alcohol, Tobacco and Firearms, which found the firearms licenses of Petitioner should be revoked on the ground that Petitioner was not qualified under 18 U.S.C. §923 (d) (1) (B) to receive Federal firearms licenses because of an alleged conviction of a member of its stockholders of a crime amounting to a felony.

2. That the cause came before the Acting Director of the Bureau of Alcohol, Tobacco and Firearms, pursuant to Title 27, Code of Federal Regulations, Part 178, Subpart E (Commerce in Firearms and Ammunition) to approve or disapprove the Findings, Conclusion, and Recommended Decision of the Administrative Law Judge, Hon. Kenneth L. Travis, dated November 1, 1977, styled Docket No. F-3, F-4, and F-5, Southeast Region, in which such acting

director reversed the trial judge.

3. That Petitioner believes the findings of the Trial Judge should be confirmed in that such findings were based on accurate findings of fact and applicable law found from issues which had been properly framed, and the reversal by the Acting Director was in error and should be set aside for such reason and for the additional reason that the Director changed the focus of the original hearing and pretended an issue had been presented and heard which had not in fact ever been presented, heard, or argued.

4. That Petitioner has been and is being deprived of due process of law and of equal treatment under the law.

WHEREFORE: Petitioner prays this Honorable Court do inquire herein and review the decisions of the Administrative

Law Judge and the Director and reinstate the findings of the Administrative Law Judge and reverse the findings of the Director, or, in the alternative, remand the matter for proper hearing raised for the first time on review by the director, to wit: the issue of whether or not one of the stockholders had control of the Petitioner corporation.

/s/ Jack F. McGuinn
Lewis Lanier and Jack McGuinn
Attorneys for Petitioner

Columbia, S. C.
May 18, 1979

RESPONDENT'S APPENDIX C

BUREAU OF ALCOHOL, TOBACCO AND FIREARMS
U. S. TREASURY DEPARTMENT

UNITED STATES OF AMERICA
In the matter of the Revocation of the Respondent's License under Chapter 44, Title 18, United States Code as a manufacturer, dealer and collector of firearms.

DAVID F. KENNISON
NEW BANNER INSTITUTE, INC., RESPONDENT

HEARING BEFORE
KENNETH L, TRAVIS,
ADMINISTRATIVE LAW JUDGE

PROCEEDINGS

P R O C E E D I N G S

(Hearing began at 9:18A.M.
September 7, 1977)

BY JUDGE TRAVIS:

Let the record show that it is now eighteen minutes after nine a.m., we are in a small courtroom in the U.S. District Courthouse, Laurel Street, Columbia, South Carolina. The date is September 7, 1977.

My name is Kenneth L. Travis, T-r-a-v-i-s. I am an Administrative Law Judge with the Bureau of Alcohol, Tobacco and Firearms. Our offices are at Room 5216 Federal Building, 1200 Pennsylvania Avenue, N.W., Washington, D.C., the zip code is 20226.

I will put the reporter under oath. Raise your right hand.

(Whereupon; PAMELA PITCHER, Notary Public and Court Reporter for

AURELIA RUFFIN &

ASSOCIATES, INC., WAS

sworn by JUDGE TRAVIS.)

Please sign that

(Reporter signs oath.)

I will witness it and give it back to your and your can attach it to the inside cover of the last page of the transcript.

Now, by whom will the parties be represented? How about the applicant?

MR. HALL: Your Honor, if it please the Court, the Appellant is represented by Ronald Hall and Jack F. McQuinn, [sic][1] 1610 Bull Street, Columbia, South Carolina, 29201.

JUDGE TRAVIS: All right. Which one are you?

MR. HALL: I am Ronald Hall. Mr. McGuinn will be with us shortly.

JUDGE TRAVIS: Thank you.

---

[1]Correct spelling is "McGuinn" all future references will be spelled correctly.

MR. MACOMBER: And the Government will be represented by John A. Macomber, that is M-a-c-o-m-b-e-r, with the Regional Counsel's Office, Southeast Region, Bureau of Alcohol, Tobacco and Firearms, 3835 Northeast Expressway, Atlanta, Georgia.

JUDGE TRAVIS: All right. As I understand the case, it involves -- correct me if I am not correct -- for the record, this involves the licenses of Mr. David F. Kennison of Columbia, South Carolina. There are three licenses. One a a dealer in regular firearms, the other as a manufacturer of ammunition, and the third license as a collector of curios and relics.

All these licenses come under Chapter 44, Title 18, United States Code.

MR. HALL: If it pleases The Court, I believe this is in regard to the license of New Banner Institute Incorporated of

which Mr. Kennison is the Director.

JUDGE TRAVIS: All right.

MR. HALL: It is not his personal license, in other words, It is the license of the corporation.

JUDGE TRAVIS: Fine. All right, and under Section 923(e) of Title 18 of the United States Code, licenses of this type, may, after due notice and opportunity for hearing, be revoked if the holder of the license has willfully violated any of the provisions of Chapter 44, Title 18, United States Code, or other regulations thereunder.

As I understand it in this case, there has been an informal hearing on a notice of contemplated revocation. Then after that, a notice of revocation was issued, and we are here today for a hearing on the notice of revocation. This hearing today will be held under authority of Section 178.75(b) of Title 27 of the Code of Federal

regulations.

Now, the proceedings are governed by the Rules of Practice and Permit proceedings, that is Part 200 of Title 27 of the Code of Federal Regulations. Under 200.82 of those Rules of Practice, I am required at the outset of the hearing like this to ask the parties, and I ask you now, have you been able to get together to stipulate facts or to do anything to shorten the hearing?

If you have not, and I know you have had an informal hearing, so you know each other and you have gone over this already. But if you need any additional time to discuss anything, I will give you a recess right now to get to this point. Tell me what your desires are and what you know about this.

MR. MACOMBER: Your Honor, we have agreed that all three licenses will be

considered as the one consolidated and the one here.

JUDGE TRAVIS: All right.

MR. MACOMBER: And we have also agreed, correct me if I am wrong, that the evidence which the Government will present at this hearing is the same evidence that was presented at the previous hearing, and we will submit that by a certified copy of the record of the prior informal hearing.

JUDGE TRAVIS: Do you have a transcript of that hearing?

MR. MACOMBER: Yes, sir.

JUDGE TRAVIS: Fine. That is part of that record, I suppose?

MR. MACOMBER: Right. We have nothing else to discuss and we are ready to proceed, I believe.

JUDGE TRAVIS: Does that sound right to you?

MR. HALL: Yes, sir.

JUDGE TRAVIS: Fine. Let me get the names of the two attorneys for the respondent. The respondents will call the holder of the licenses. And you name, sir?

MR. HALL: Ronald Hall.

JUDGE TRAVIS: And the other attorney that will come?

MR. HALL: Jack McGuinn. M-c-G-u-i-n-n.

JUDGE TRAVIS: All right. Now, I am satisfied that you are ready to proceed, and if the burden of proof is upon the Government, Mr. Macomber, you may proceed.

MR. MACOMBER: Well, as a preliminary matter, I will offer certain exhibits which will be repeated in the transcript for the purpose of having little more order with respect to this. The exhibits would show the progress which led up to the initial hearing, we will submit separately.

And as Government Exhibits One, Two, and Three, we will offer the copies of the Notice of Contemplated Revocation as

to each of the three licenses.

(Government Exhibits One, Two, and Three, Notice of Contemplated Revocation, were offered into evidence.)

JUDGE TRAVIS: I have these. Government's Exhibit One is a copy of a Notice of Contemplated Revocation as to Discussion the license as a manufacturer of ammunition, Two as a copy of the license as a dealer in firearms other than destructive devices or ammunition of the same, and Three as the copy of the license of the Notice of Contemplated Revocation of the license as a collector of curios and relics.

These are three Notices of Contemplated Revocation. Any OBJECTION to these going into the record?

MR. HALL: No, sir, no OBJECTIONS.

JUDGE TRAVIS: All right. They are

admitted as marked.

(NOTICE OF CONTEMPLATED REVOCATION OF LICENSE was marked for identification as Government Exhibits One, Two, and Three, and made a part of the record, herein.)

MR. MACOMBER: And the Government will offer as Government's Exhibit Number Four, the request for a hearing which resulted in the first hearing. This request was submitted by Mr. McGuinn, January 20, 1977.

JUDGE TRAVIS: Any OBJECTION to that, Mr. Hall?

MR. HALL: No, sir. No OBJECTIONS.

JUDGE TRAVIS: All right. Admit it as Government's Exhibit Four.

(Letter by Mr. Jack McGuinn, dated January 20, 1977, concerning a request for a hearing

was marked for identification as Government's Exhibit Four, and made a part of the record, herein.)

JUDGE TRAVIS: For the record, Mr. Hall, you have two gentlemen sitting at the table with you. Who are they?

MR. HALL: This is Mr. Kennison and Mr. Holcombe.

JUDGE TRAVIS: All right. Fine.

MR. MACOMBER: The Government will offer Government's Exhibits Five, Six, and Seven, the Notice of Revocation of License which was issued with respect to each of the three licenses after the first hearing.

JUDGE TRAVIS: Any OBJECTION to those, Mr. Hall?

MR. HALL: No, sir. No OBJECTIONS.

JUDGE TRAVIS: All right. They are admitted as marked.

(Notice of Revocation of License was marked for identification as Government Exhibits Five, Six, and Seven, and made a part of the record, herein.)

MR. TRAVIS: Five is the Notice of Revocation as a dealer, Six is a copy of the Notice of Revocation of the license as a collector of curios and relics, and Seven is a copy of the Notice of Revocation of the license as the manufacturer of ammunition.

Go ahead.

MR. MACOMBER: And as Government's Exhibit Number Eight, we will offer the request for hearing which was submitted by Mr. McGuinn prior to the present hearing.

JUDGE TRAVIS: Any OBJECTIONS to that?

MR. HALL: No, sir. No OBJECTIONS.

JUDGE TRAVIS: Admit it as marked.

(Letter by Jack McGuinn concerning a request for a hearing was marked for identification as Government's Exhibit Eight, and made a part of the record, herein.)

MR. MACOMBER: And I will offer as Government's Exhibit Nine, your order setting time and place of hearing.

JUDGE TRAVIS: All right. Any OBJECTION to that?

MR. HALL: No, sir. No OBJECTIONS.

JUDGE TRAVIS: All right. I have the original order in my hand so you can keep your copy. I will mark the original as Government's Exhibit Nine and admit it as part of the record.

(ORDER SETTING TIME AND PLACE OF HEARING was

marked for identification as Government's Exhibit Nine, and made a part of the record, herein.)

JUDGE TRAVIS: All right. Right now it is 9:30 A.M. I want to call just a short recess so that I can read these exhibits that have already been put into the record. Bear with me just for a couple of minutes.

(Off the record for a short recess.)

JUDGE TRAVIS: The hearing will come to order. It is now 9:32 A.M. I just took a couple of minutes to read quickly through the exhibits. Mr. Macomber, you may proceed.

MR. MACOMBER: The Government will next offer as Government's Exhibit Ten, Eleven, and Twelve, copies of the application for license which was submitted for each of three licenses.

JUDGE TRAVIS: Any OBJECTION to these coming in?

MR. HALL: No, sir. No OBJECTIONS.

JUDGE TRAVIS: All right. They are admitted and I will mark them as follows: certified copy of the application for license as a dealer is marked Government's Exhibit Ten, certified copy of the application for license as a manufacturer of ammunition for firearms other than destructive devices is marked as Government's Exhibit Eleven, certified copy of the application of New Banner Institute, Inc., for a license as a collector of curios and relics is marked as Government's Exhibit Twelve.

They are admitted as marked. Ten, Eleven, and Twelve. Go ahead, Mr. Macomber.

(Copies for the application for license, was marked for identifica-

tion as Government's Exhibit Ten, Eleven, and Twelve, and made a part of the record, herein.)

MR. MACOMBER: And the Government offers as Government's Exhibit Number Thirteen, a certified extract of records from the regional office, pertaining to the conviction of Mr. Kennison who is a member of the New Banner Institute.

MR. HALL: No OBJECTIONS.

JUDGE TRAVIS: That will be Government's Exhibit Thirteen. No OBJECTION by the respondent, it is admited as marked.

(Certified extract of records pertaining to the conviction of Mr. Kennison was marked for identification as Government's Exhibit Thirteen, and made a part of the record, herein.)

MR. MACOMBER: And the Government offers as Government's Exhibit Number Fourteen, a certified copy of the transcript of the prior hearing.

JUDGE TRAVIS: Does that include the exhibits and so on?

MR. MACOMBER: It includes the exhibits that were all offered at that time.

MR. HALL: No OBJECTIONS.

JUDGE TRAVIS: Government's Exhibit Fourteen is admitted as marked. It is now part of the record. Fourteen is like the original transcript, the earlier hearing in this same case held on April 6, 1977, before Hearing Officer Robert G. Thomas.

It was held here in the same Federal building in Columbia, South Carolina, and it includes the exhibits, admitted and introduced during that hearing.

Government's Exhibit Fourteen is admitted. Go ahead, Mr. Macomber.

(Certified copy of the transcript of the prior hearing was marked for identification as Government's Exhibit Fourteen and made a part of the record, herein.)

MR. MACOMBER: And the Government rests.

JUDGE TRAVIS: All right. Mr. Hall, what do you have to offer?

MR. HALL: Yes, sir. We call Mr. David Kennison to the stand for his testimony, please.

WHEREUPON,

DAVID FOSTER KENNISON

was called for examination by the Respondent, and having been duly sworn, was examined and testified as follows:

D I R E C T E X A M I N A T I O N

BY MR. HALL:

Q State your name for the record,

please, sir?

A David Foster Kennison.

Q And your address?

A 121 South Bull Street.

JUDGE TRAVIS: Columbia, South Carolina.

A Columbia, South Carolina.

Q Mr. Kennison, are you a director and or officer of the New Banner Institute, Incorporation of Columbia, South Carolina?

A Yes, I am a Director.

Q And as such, you have, under the name of the corporation, applied for a license under Title 18, U.S.C. Chapter 44, firearms, for the possession and sale of firearms?

A Yes, that is right.

Q And is this a copy of the application that you submitted?

(Witness is shown application.)

A Yes, it is.

Q All right. If it please The Court, I believe this is a copy that has already been admitted into evidence.

JUDGE TRAVIS: That will probably be Government's Exhibit Ten. Le me check.

(Judge Travis searches for the exhibit.)

JUDGE TRAVIS: Yes.

MR. HALL: Yes, sir.

JUDGE TRAVIS: I will hand you Government's Exhibit Ten and you can show that to him.

BY MR. HALL:

Q (Continues to Witness) I show you Government's Exhibit Ten, Mr. Kennison, and ask you again, is this the application which you, as Director or Officer or New Banner Institute made?

A Yes, it is.

Q All right. Mr. Kennison, I draw your attention to page two, block twenty-four, question A of this application, and

ask you if you would read that. Block twenty-four, line A.

(Witness reads from application.)

A "Has applicant or any person named in item twenty-one ever been convicted in any court of a crime punishable by imprisonment for a term exceeding one year."

Q All right. And on that application, is your name contained in block twenty-one?

A Yes, it is.

Q And how was that question answered?

A "No."

Q All right. I will return this to The Court.

(Mr. Hall returns copy of the exhibit.)

Q All right. Mr. Kennison, I call your attention to the date of September 8, 1974. Do you recall on that date being in the County of Des Moines, in the State

of Iowa; September 8, 1974?

A On or about that date; yes, I do.

Q All right. And do you recall being arrested that day?

A Yes, I do.

Q And do you recall what the charge was?

A The charge was kidnapping.

Q Was there any other charge?

A No, there was not.

Q All right. Do you recall subsequent thereto, on or about January 14, 1975, appearing in the District Court of Iowa, Des Moines County?

A Yes, I do.

Q And do you recall the substance or result of those proceedings?

A (No response.)

Q Well, you were called into that court to answer the charges for which you were arrested on September 14, 1974. Is it true, Mr. Kennison, that those charges

of kidnapping -- what happened to those charges? Did you go to jail?

A Well, upon being arrested I did, yes.

Q No, I am speaking of subsequent to your appearance in court?

A No, I did not.

A All right. What was the disposition of those charges of kidnapping?

A The kidnapping charges were dropped.

Q And do you recall why those charges were dropped?

A In investigating the case, it was later found that the person who claimed to be kidnapped was using a false name, and the correct identity of the person was that it was my wife. That was the only facet of it.

Q All right. Mr. Kennison, on or about September 8, 1974, when you were arrested, were you also charged with carry-

ing a pistol on or about your person without a permit against the peace and dignity of the state of Iowa?

A No, I was not.

Q You were not made with that charge?

A No, sir. I was not charged.

Q All right. Mr. Kennison, did you plead guilty to any charges in Des Moines County District Court?

A Yes, I did.

Q And what were those charges?

A I plead guilty to an offense. I was not actually charged with it as I just testified, but I plead guilty to having a hand gun in violation of the prescription as in Iowa, for carrying one.

Q All right. Now, at this time in September 1974, where were you residing at the time? Not exactly but where? Columbia?

A Well, my official address was the same as I testified earlier.

Q Columbia, South Carolina?

A That is correct.

Q You were not living in Des Moines?

A No, I was not.

Q How long had you been in Des Moines prior to September 8, 1974? Do you recall?

A Less than twenty-four hours.

Q All right. You just made a visit there?

A That is correct.

Q All right. And you were arrested, and these charges were made, and now, you said that you pleaded guilty. What were the circumstances surrounding your plea?

A The circumstances were that the prosecuting attorney, and confirmed...

Q The prosecuting attorney in Des Moines County?

A Des Moines County, in conferring with my attorney, Bryan Schulte, indicated that he wanted me to plead guilty to something, and I indicated that I did not

want to plead guilty to anything unless it was something I had done.

On the other hand, I did not want to plead guilty to anything that would lead to a conviction that would hamper my rights as a citizen, and in particular, to do business in firearms and carry possessed arms.

And I was assured by my attorney and by the judge that by pleading guilty to this charge, unless I was convicted of a crime within a subsequent year, that judgment will be withheld and under Iowa law, that no conviction would occur, that the record would be expunged, and that there would be no necessity of application for restoration of rights, et cetera, since no conviction would have occurred under the Iowa law.

With that understanding, I entered a plea of guilty to it. Carrying firearms not in the manner prescribed from the Iowa law.

Q All right. This conversation or

this communication between yourself, the prosecuting attorney, the judge, and your attorney; where did this take place?

A In the courtroom.

Q In open court?

A Yes. The prosecuting attorney, the judge, myself, were called.

Q Your case was called and you presented yourself before the bench?

A That is right.

Q And then subsequent to that conversation and communication meeting at which you were advised certain things by the judge, by the Court; what happened then? Do you recall?

A Yes: The firearms that had been in possession of the prosecutor were returned.

Q They were returned to you?

A That is correct. And we were allowed to go home, and one year later, we sent the notification that we had

successfully gone through a year without having been arrested, and that therefore the third judgment was expunged from the record. There was no conviction.

Q All right. And so for this year, subsequent to your appearance before the bench in Des Moines County, you are allowed to return to South Carolina?

A That is correct.

Q And then subsequently at the end of the year, you received some notice in the mail. Do you recall where that notice was from?

A It was from the Des Moines court.

Q At this time, I will call The Court's attention to that noticd, which I believe is part of the Government's Exhibit and I beg The Court's pardon. I am not sure exactly which...

JUDGE TRAVIS: It should be part of Fourteen, I guess, somewhere here.

MR. HALL: Thirteen.

JUDGE TRAVIS: Oh, Thirteen?

MR. HALL: Thirteen. It is also included in Fourteen.

JUDGE TRAVIS: I have Thirteen here. What is that again you are referring to?

MR. HALL: It is the notice or order. Actually it is the order of The Court in Des Moines County...

JUDGE TRAVIS: All right.

MR. HALL: Dismissing the charges and expunging Mr. Kennison's record.

JUDGE TRAVIS: Wait, I am looking for that now.

(Judge looks for the exhibit.)

JUDGE TRAVIS: You are referring to an order dismissing the firearms charge; is that right?

MR. HALL: And expunging Mr. Kennison's record, yes, sir.

JUDGE TRAVIS: I do not see that

in Thirteen, so it may be in Fourteen. I will look.

(Judge looks for the information in Exhibit Fourteen.)

JUDGE TRAVIS: If you would come up to the bench, maybe you can find that for me here. I would like to read it right at this stage. I do not have it yet. Mr. Macomber, would you come up here and help me?

MR. HALL: If it please The Court, I think in the interest of time, we can call The Court's attention to, I think it is Government's Exhibit Fourteen, the handwritten letter or Russel D. Fry where it says, or stamped, "Received November 11, 1976, Regional Counsel, Southeast Region."

JUDGE TRAVIS: All right. The handwritten letter. Was the letter contained as...

MR. HALL: Well, this is in

response, I think, to the Government's inquiry as to the disposition of these charges.

JUDGE TRAVIS: And that is all you have? You do not have an order...

MR. HALL: I thought we did have.

JUDGE TRAVIS: You did have? Well, if you have it, I would like to make it part of the record also. Would you look for it? Because in this Government's Exhibit Fourteen, I do see an order for the 28th of July, 1975, dismissing the kidnapping charges, and going into details about this.

And then I have another order deferring the sense as to the firearms charges, placing Mr. Kennison on probation and this order states, "...that if he observes the terms and conditions during this period of probation as may be imposed by his supervising officer, and if he fulfills the term of such probation, an

Order may be entered discharging the defendant without the entry of judgment."

I also have a copy of this handwritten letter, "To Whom It May Concern," signed by Russel D. Fry, the probation officer, but I do not have the order. Do you have it there now?

MR. HALL: If it please The Court, I have no explanation for what happened to the order. I was under the impression it was a matter of the record, but if it please The Court, we would ask permission to submit this note -- we would request permission for time to obtain a certified copy of this order from Des Moines, and submit it to The Court.

JUDGE TRAVIS: Fine. Will you submit it to Mr. Macomber who will in turn, grant endorsement on the letter or something, and submit it to me, and I will put it into the record.

MR. HALL: Sure.

JUDGE TRAVIS: Is Mr. McGuinn here now?

MR. HALL: Yes, sir. This is Mr. McGuinn.

(Points out Mr. McGuinn)

JUDGE TRAVIS: Fine. That is Jack McQuinn. We were waiting for you and expected you to come, and I want to put it in the record that you are present at this time. All right. That will be acceptable. Certainly I want that as part of the record, the order releasing Kennison from probation, and the order will probably say the judgment is not going to enter or is not there anymore.

MR. MACOMBER: I can only say, Your Honor, that when the regional office requested that we received, what is contained in -- well, it is part of the record in Exhibit Fourteen and it is Exhibit Thirteen standing by itself.

JUDGE TRAVIS: All right.

MR. MACOMBER: The records which were submitted from The Court and all that were received pertaining to this matter.

JUDGE TRAVIS: Fine. Now, our agreement is that Mr. Hall and Mr. McGuinn will obtain a copy of that order, send it through you to me and I will put it in the record of the case. That is it. Go right ahead with whatever else you have.

MR. HALL: Thank you, sir.

BY MR. HALL:

Q (Continues to Witness) Mr. Kennison, a year after your appearance in court in the Des Moines County Court, you received this notice in the mail and as far as you were concerned, that ended the matter?

A That is correct.

Q All right. Now, this application which I called your attention to earlier for which you made application in the name of New Banner Institute for a license

to deal in firearms, do you recall when you made out this application or when it was completed?

A I do not recall the exace date.

Q Okay, but do you recall whether that application was made out subsequent to the notice you received from Des Moines County?

A I believe it was, yes.

Q So, when you answered this question, "Has applicant or any person named in item twenty-one ever been convicted in any court of a crime punishable by imprisonment for a term exceeding one year," you answered that based on what?

A I answered that based on the advice of my prosecuting attorney and the judge.

Q In Des Moines County?

A That is correct. And I might say, also based on the advice of some officials in South Carolina who were observing me for the year to see that I had not been

arrested.

Q What officials were those?

A With the South Carolina Department of Probation.

Q Okay. You were reporting to them?

A Well, I would occasionally report to them that I had not been arrested throughout the one year period.

Q All right. Answer any questions counsel has.

JUDGE TRAVIS: One question first before you start.

BY JUDGE TRAVIS:

Q Did you just testify that you made your application during your period of probation or after it was over? I was not clear on that.

MR. HALL: I believe, Your Honor, he testified it was made after it was over.

JUDGE TRAVIS: All right. Now, I look, for example, Government's Exhibit

Eleven. This is the application for a license as a manufacturer of ammunition. It seems to me like it was executed on March 15, 1975...

MR. HALL: I believe that is an error, Your Honor. If you notice, Mr. Robert Black Signed it on May 10, 1976, and Mr. Griffin executed it on June 14, 1976.

JUDGE TRAVIS: All right.

MR. HALL: I believe Miss King made an error there and meant to put March 15, 1976.

JUDGE TRAVIS: Mrs. Macomber, is that correct? Let's resolve that.

MR. HALL: You will notice also on the...

MR. MACOMBER: Each of those applications has one date '75, and one date '76, and they were submitted...

JUDGE TRAVIS: I have dates stamped on the copies that I have as

received March 18, 1975 by the Bureau of A.T. & F. So it must have been submitted in March of '75.

MR. HALL: I notice that is stamped, Your Honor. but also call The Court's attention to the other two stamps on the front of the application dated May 14, 1976, firearms A.T.F., and down at the bottom of page -- well, I am calling it page one -- received June 14, 1976, 11:32 a.m., firearms A.T.F.

I have no explanation for the March 18, 1975 date.

JUDGE TRAVIS: Another question. I have the three applications here. Government's Exhibits Ten, Eleven, and Twelve. These applications were apparently signed at the half of the company, the applicant, by Sandra Cain and Robert Black; is that correct? These applications. They are not signed by Mr. Kennison that I see here. Are they? I am just asking?

MR. HALL: No, sir. They probably are not signed by Mr. Kennison. As you recall, at the beginning of the hearing, I called the Court's attention that these applications were made in the name of New Banner Institute of which Mr. Kennison is Officer and Director.

JUDGE TRAVIS: And you asked Mr. Kennison about question 24-A; is that right? A direct question?

MR. HALL: Yes, sir.

JUDGE TRAVIS: You asked him whether or not he indicated that he had been convicted of a felony, and his answer was that he indicated that he had never been convicted of a felony. But he did not even file the applications or did he?

These applications were filed by other people, not Mr. Kennison.

MR. HALL: No, sir. But under the Firearms Act, it states that if any person who is a Director or Officer of the

Corporation has never been convicted.

JUDGE TRAVIS: Yes, I understand that all right, but I was under the impression that it was Mr. Kennison who executed the application but it was not.

Am I correct in saying that he did not execute it, someone else did? At least I am looking at Government's Exhibit Twelve here in the left corner.

MR. HALL: Yes, sir. Robert Black is President of the Corporation and executed the application.

JUDGE TRAVIS: Also a Sandra L. Cain who is Acting Secretary Treasurer also signed it; right?

MR. HALL: Yes, sir.

JUDGE TRAVIS: And that stands true for all three of the applications that we are concerned with?

MR. HALL: Yes sir.

JUDGE TRAVIS: And because of that, you are charging the Corporation with will-

fully violating a provision of Chapter 44, Title 18, United States Code; is that right, Mr. Macomber?

MR. MACOMBER: Yes, sir.

JUDGE TRAVIS: All right. I am just trying to understand your case. Go ahead, Mr. Macomber.

MR. MACOMBER: In order to explain the discrepancy on the dates that are shown on those applications, one being in 1975 and one being in 1976, I will offer as a Government Exhibit, a letter which I find in the file from the New Banner Institute, dated May 11, 1976, which refers to one of the applications.

JUDGE TRAVIS: Let's wait for that until after we get through. All right. Go ahead with it. You started it, go ahead.

MR. MACOMBER: This simply indicates that the original applications with the information that you requested, will be returned to A.T.F. In addition, please

note changes in items seven, nine, ten and addendum to attachment which would indicate that the applications were originally submitted, and they were returned because they were incomplete.

JUDGE TRAVIS: And then they were resubmitted...

MR. MACOMBER: And then they were subsequently...

JUDGE TRAVIS:...at the later date?

MR. MACOMBER:...executed under a different date and resubmitted.

JUDGE TRAVIS: All right.

MR. MACOMBER: And I just offerred this as Government's Exhibit Fifteen for that purpose.

JUDGE TRAVIS: Any other response? Do the attorneys have any OBJECTION to that?

MR. HALL: We have no OBJECTIONS, Your Honor.

JUDGE TRAVIS: All right. It is

admitted as Government's Exhibit Fifteen.

(Letter, dated May 11, 1976, by W. Robert Black was marked for identification as Government's Exhibit Fifteen, and made a part of the record, herein.)

JUDGE TRAVIS: Now, one more question before you start cross examination.

BY JUDGE TRAVIS:

Q At the time the applications were filed, Mr. Kennison, what was your position in the company?

A I was a member of the Board of Directors of the company.

Q Are you part owner of the company?

A That is correct.

Q What part do you own?

A Approximately one-sixth of the stock.

Q Well, before the application was

filed, did you discuss the application with any of the people that executed it?

A Yes.

Q Did you discuss your problem in Iowa?

A Correct. Also prior to that, I discussed it with the State Law Enforcement Division in South Carolina to make sure that it would be okay to get a pistol dealers license as well, and they indicated that it would be all right to get one and they issued one.

Q That is a state license?

A That is correct.

Q All right. I believe I understand it now. Mr. Macomber, you may go ahead and cross examine as you wish.

C R O S S E X A M I N A T I O N

BY MR. MACOMBER:

Q Now, Mr. Kennison, with respect to this transaction or incident in Des Moines, Iowa, you knew that you got arrested at that time?

A That is correct.

Q And you knew that subsequently, you appeared in court before a judge?

A That is correct.

Q And you did enter a plea of guilty?

A To a different charge, that is correct.

Q Do you know the charge to which you plead?

A The charge was, I believe, unlawful possession or something close to that.

Q Could it have been carrying a concealed weapon?

A That might have been the name of the charge, yes.

Q When you were arrested, did you

have a weapon on your person?

A Not exactly on my person. There was a weapon in the car that I was in when I was arrested.

Q And either your counsel or the judge or somebody explained to you that by pleading guilty to that charge, the more serious kidnapping charges would be dropped?

A That is not correct. The kidnapping charge was no more serious. They both carry exactly the same penalty. It is just that I refused to plead guilty to anything that I had not done.

JUDGE TRAVIS: Pardon me. What was the penalty for this?

WITNESS: Kidnapping.

JUDGE TRAVIS: For both of these? You said they were the same.

WITNESS: The maximum penalty was five years. If I might explain, they have a sort of a minor kidnapping statute and Iowa carries a maximum penalty of

five years.

BY MR. MACOMBER:

Q (Continues to Witness) But you knew that you did enter a plea of guilty to an offense which was punishable by imprisonment for five years?

A That is correct.

Q And you knew that as a result of your plea, you were placed on probation?

A I was placed under observation of the probationary department, but I believe their strict technical term for it is something other than probation.

Q But you knew that you had to answer to The Court if you got out of line again; did you not?

A If I got arrested within one year, correct.

Q So you were fully aware, at the time that you entered your plea, that The Court had some jurisdiction over you as a result of it?

A I am not sure if I am legally qualified to answer that question, but I would tend to say "yes".

Q Well, you knew you were expected to behave yourself from there on?

A That is correct.

Q And what was the reason that you believe that?

A That the third judgment would be expunged rather than executed at the end of a year's time if I did not get arrested within a year's time.

Q So that you did understand that during that year, The Court was in a position to take some further action with respect to you?

A They would have been if I had gotten arrested, yes, sir.

Q I have no further questions.

R E D I R E C T E X A M I N A T I O N

BY MR. HALL:

Q Just one question, Mr. Kennison.

What was your intention -- what were you trying to do in filling out this application for the license which you made to the Federal Government correctly? In other words, what was your intention?

JUDGE TRAVIS: You are asking him now what was his intention when he filled out the applications regularly.

MR. HALL: Right. In other words, would the knowledge of what had happened in Des Moines, Iowa and with the knowledge of what you had been told by the gentlemen in the bench and the knowledge of the notice that you received in Des Moines, Iowa, what was...

A My intention was to fill it out as carefully as possible, both the Federal and the State form.

JUDGE TRAVIS: Did you fill those applications out yourself?

WITNESS: No I am speaking in a Corporate manner.

JUDGE TRAVIS: Yes, all right.

WITNESS: Our intention as the Corporation was to fill out the forms as correctly as possible, which is why I was involved in discussions with the people who filled it out, and with the State Law Enforcement Division, and I made a point of mentioning the incident in Iowa and making sure that the incident in Iowa were mentioned both to the Federal and the State people involved to find out whether or not they were pertinent and should be listed on the forms.

The were told by the -- over the telephone -- but nevertheless we were told by someone in the A.T.F. office that...

JUDGE TRAVIS: Where? Here in Columbia?

WITNESS: In Columbia. That it would not be necessary to say anything about it on the forms, on the other hand,

State Law Enforcement Division did ask us to go ahead and write on the forms what had happened in Iowa and what the disposition was. So we complied with both, and both licenses were issued.

MR. HALL: I have no further questions.

MR. MCGUINN: If it might please The Court...

JUDGE TRAVIS: Go right ahead.

MR. MCGUINN: I am sorry I was late this morning, But I am going back in law school trying to learn about this practice. I was a trial lawyer, but I cannot try cases in court, so I am trying to learn to be an office lawyer.

There is one question I would like for you to consider, Your Honor. Can you hear me all right?

JUDGE TRAVIS: Yes, I can hear you.

MR. MCGUINN TO REPORTER: Can you hear me?

REPORTER: Yes.

MR. MCGUINN: From the state stage, let's say in this case, the Iowa -- the offense, he is charged with having committed this felony. In South Carolina, it is a misdemeanor. These are wrong understandings from clients of mine. I thought it was a misdemeanor, you know, in Iowa, but I got the Iowa statute instead.

But apparently up there it is only a misdemeanor in South Carolina, but I would like to pose a question for your Honor to rule on. Is the regulation or statute constitutional which allows the individual states to underweigh the punishment due by maybe the differences in punishment of clause of the same act, by the constitutional issue of equal protection of the laws and the equal application of the laws?

I would like The Court to consider that to go on with this case.

JUDGE TRAVIS: Al right. Mr. McGuinn, I am required to give you the opportunity to file proposed findings and facts and conclusions of law, and a brief, and I will cross the briefs and allow you to fiel reply of briefs, so probably the best place to raise that legal issue would in your brief.

MR. MCGUINN: But I would like to introduce it into the evidence by asking the court to enter the evidence and take judicial notice of the federal constitution of the equal protection clause together with the differences of the Iowa statute and South Carolina statute.

And furthermore, Your Honor, in Iowa, where this question came up, they said that a defendant, the discharge. I am quoting them about the terms of that locations, of the probation, after the third sentence, does not lose any of his rights of citizenship or incidence thereof

by him, where there has been -- where the defendant was discharged from probation which is this case.

No conviction occurs in a strict legal sense, but that is the case where the State versus Farmer, F-a-r-m-e-r. It was a 1975 case found in 234 Northwestern Second...

JUDGE TRAVIS: 234 what?

MR. MCGUINN: ...Northwestern Second, back page 89.

MR. HALL: If it please The Court, I have a copy of that case down with me.

JUDGE TRAVIS: All right.

MR. MCGUINN: Your Honor, may we submit that by brief?

JUDGE TRAVIS: That will be fine.

MR. MCGUINN: Thank you. We will send a copy in the order the file copies are in.

JUDGE TRAVIS: All right.

MR. MCGUINN: I just wanted to be

sure that got into the case.

JUDGE TRAVIS: All right.

MR. MCGUINN: Thank you, Judge.

JUDGE TRAVIS: Anything further from this witness?

MR. HALL: No, Your Honor.

JUDGE TRAVIS: You are excused.

(Whereupon, the testimony of DAVID FOSTER KENNISON was concluded.)

JUDGE TRAVIS: Any further witnesses to call?

MR. HALL: No, Your Honor. As I understand, though, you are going to allow us some cross briefs?

JUDGE TRAVIS: All right. Now, does anyone have anything further to offer?

MR. HALL: No, Your Honor.

JUDGE TRAVIS: Now, what happens next is that the transcript is prepared. We will obtain a copy of the transcript

from our reporter here, and the regulations that govern our practice say that I should give you fifteen days from the date that you receive your copy of the transcript, to file proposed findings or facts and conclusions of law.

This is not a requirement that you file these, but it is your right under the administrative procedures act. Now, if fifteen days will not be enough time, tell me now. I can increase that to thirty days.

MR. MCGUINN: We are asking if that is fifteen days after we have the transcript.

JUDGE TRAVIS: Yes.

MR. HALL: Yes, Your Honor, that will be fine.

JUDGE TRAVIS: That will be fine? All right. Now, by your proposed findings or facts and conclusion of law, your brief, and with me at my office address that is

made a part of the record in Washington, then I will cross the briefs.

I will send the response briefs to the governor attorney, the governor's brief to the respondent's attorney. Now, I will give you fifteen additional days after you receive that to file a reply brief if you wish to file one with me, and then after that, I will issue a decision.

Anything further to offer?

MR. HALL: No, Your Honor. We have nothing to offer.

JUDGE TRAVIS: All right. Now, it is seventeen minutes after ten a.m. The hearing is closed. Thank you.

MR. HALL: Thank you, Your Honor.

(Whereupon, the hearing was concluded at 9:17 A.M., September 7, 1977.)

Petitioner's Reply Brief

Office - Supreme Court, U.S.
FILED
MAR 11 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1180

In the Supreme Court of the United States

OCTOBER TERM, 1981

G.R. DICKERSON, DIRECTOR, BUREAU OF ALCOHOL, TOBACCO AND FIREARMS, PETITIONER

v.

NEW BANNER INSTITUTE, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY MEMORANDUM FOR THE PETITIONER

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-1180

G.R. DICKERSON, DIRECTOR, BUREAU OF ALCOHOL, TOBACCO AND FIREARMS, PETITIONER

v.

NEW BANNER INSTITUTE, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY MEMORANDUM FOR THE PETITIONER

---

1. Respondent asserts (Br. in Opp. 7-8) that this case will soon be outside the Court's "jurisdiction" because of plans announced by the Administration to abolish the Bureau of Alcohol, Tobacco, and Firearms (BATF), the agency now responsible for enforcing the federal firearms laws at issue in this case. This argument is predicated on a misconception of the Administration proposal and is accordingly wholly irrelevant to the suitability of this case for decision by the Court.

As Deputy Secretary of the Treasury R. T. McNamar recently explained in testimony before the Subcommittee on Treasury, Postal Service, and General Government of the Senate Committee on Appropriations, the Administration plans to reassign the functions of the BATF within the Department of the Treasury to the United States Secret Service and the Customs Service. See 128 Cong. Rec. D106

(daily dig. Feb. 23, 1982). The functions of firearms and explosives enforcement and regulation are to be reassigned to the Secret Service, which will carry out the enforcement task in part with the assistance of 1200 BATF special agents who will be transferred into the Secret Service. This reorganization plan entails no amendment of the statutory provisions applicable in this case and therefore no reduced need for an authoritative answer to the question presented by the petition.[1]

We will inform the Court when that reorganization plan goes into effect so that an order may be entered, pursuant to Rule 40.3 of the Rules of this Court, substituting as petitioner the successor to the functions of the Director of the Bureau of Alcohol, Tobacco and Firearms.

2. Respondent's discussion of cases cited in the petition consists in large part of factual distinctions irrelevant to the propositions for which the cases were cited. (See, *e.g.*, the discussions of *Huddleston* v. *United States*, 415 U.S. 814 (1974) (Br. in Opp. 29-32), and *United States* v. *Arrington*, 618 F. 2d 1119 (5th Cir. 1980) (Br. in Opp. 43-45).)

With respect to the cases cited in our petition as indicative of the division among the circuits on the question presented for review (Pet. 16-17), respondent makes a general contention that the cases are factually distinguishable or inapposite (Br. in Opp. 17). Respondent goes on to argue (Br. in

---

[1]A bill to amend federal firearms laws, which would, *inter alia*, provide that no conviction that had been expunged could be considered a conviction under the Gun Control Act of 1968, 18 U.S.C. 921 *et seq.*, has been introduced in the Senate but has not been reported out of the Committee on the Judiciary, to which it was referred. S. 1030, 97th Cong., 1st Sess. (1981); 127 Cong. Rec. S4100 (daily ed. Apr. 29, 1981). In previous years, bills to amend or repeal the Gun Control Act have been introduced and have never come to a vote in either house. See, *e.g.*, S. 1862, 96th Cong., 2d Sess. (1980); H. R. 5225, 96th Cong., 1st Sess. (1979); S. 141, 94th Cong., 1st Sess. (1975); and H. R. 12353, 92d Cong., 1st Sess. (1971). The mere fact of introduction of S. 1030 accordingly has no bearing on the need for this Court's review of the issue presented by our petition.

Opp. 19-21), however, that the court below correctly aligned itself with courts that *rejected* the rationale of decisions from the Eighth and Ninth Circuits—two of the circuits on whose precedents respecting state expunction statutes our petition relies.

Of the conflicting cases cited in our petition, respondent discusses only *United States* v. *Bergeman*, 592 F. 2d 533 (9th Cir. 1979), in detail (Br. in Opp. 24-26). Although, as respondent states, the circumstances of the state prosecution of the defendant in *Bergeman* differed in some respects from the prosecution of Mr. Kennison (respondent's director at the time of the applications for the federal firearms licenses), those factual details do not avoid the conflict because the Ninth Circuit did not rely on them. It stated the issue (592 F. 2d at 535) as simply "whether a person who has had a state criminal conviction dismissed pursuant to the Idaho expunction statute may still be considered a person who has been convicted of a crime punishable for a term exceeding one year within the meaning of 18 U.S.C.A. § 922(h)(1)."

In any event, the court below expressly acknowledged a conflict between its resolution of the expunction issue and the treatment of similar issues in decisions of the Fifth, Eighth, and Ninth Circuits, and it declined to follow the rationale of those cases (Pet. App. 7a-8a).

For the foregoing reasons, and for the reasons set forth in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

REX E. LEE
Solicitor General

MARCH 1982

DOJ-1982-03

Petitioner's Brief

Office - Supreme Court, U.S.
FILED
JUN 21 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1180

In the Supreme Court of the United States

OCTOBER TERM, 1981

G.R. DICKERSON, DIRECTOR, BUREAU OF ALCOHOL, TOBACCO AND FIREARMS, PETITIONER

v.

NEW BANNER INSTITUTE, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE PETITIONER

REX E. LEE
Solicitor General

J. PAUL MCGRATH
Assistant Attorney General

KENNETH S. GELLER
Deputy Solicitor General

SAMUEL A. ALITO, JR.
Assistant to the Solicitor General

WILLIAM KANTER
DOUGLAS LETTER
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether firearms disabilities imposed by provisions of the Gun Control Act, 18 U.S.C. 922(g) and (h), apply to a person who was convicted of a state offense punishable by imprisonment for a term exceeding one year but whose conviction was expunged under state law following successful probation.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statutes involved	2
Statement	2
Summary of argument	7
Argument:	
The disabilities imposed by the Gun Control Act upon any person who "has been convicted" of certain crimes are not automatically removed by the expunction of the conviction under a state statute	11
A. The language of 18 U.S.C. 922(g)(1) and (h)(1) unambiguously applies to any person who has been convicted of a state offense punishable by more than one year's imprisonment even if the conviction has been "expunged" under state law	11
B. Other provisions of the federal gun control laws and related federal statutes reinforce the conclusion that expunction of a qualifying state conviction was not intended automatically to remove the federal firearms disabilities resulting from that conviction	17
C. The purpose and history of the Gun Control Act are inconsistent with the automatic removal of federal firearms disabilities based upon state expunctions	24
D. A rule that gives effect to expunctions under widely varying and frequently ambiguous state laws would seriously hamper effective enforcement of the Act	30
Conclusion	43
Appendix	1a

TABLE OF AUTHORITIES

Cases: Page

American Textile Manufacturers Institute v. *Donovan*, 452 U.S. 490 24
Barrett v. *United States*, 423 U.S. 212 ..... 9, 18, 25, 28
Carlesi v. *New York*, 233 U.S. 51 7
Chapman v. *Houston Welfare Rights Organization*, 441 U.S. 600 24
Consumer Product Safety Commission v. *GTE Sylvania*, 447 U.S. 102 12
FTC v. *Sun Oil Co.*, 371 U.S. 505 18
Gutierrez-Rubio v. *INS*, 453 F.2d 1243 41
Huddleston v. *United States*, 415 U.S. 814 ..... 25, 40
Hyland v. *Fukuda*, 580 F.2d 977 12
Iowa Beer & Liquor Control Department v. *McBlain*, 263 N.W.2d 226 39
Jackson v. *Virginia*, 443 U.S. 307 28
Jerome v. *United States*, 318 U.S. 101 27
Kolios v. *INS*, 532 F.2d 786, cert. denied, 429 U.S. 884 41
Lehman v. *Nakshian*, 453 U.S. 156 18
Lewis v. *United States*, 445 U.S. 55 8, 12, 13, 14, 15, 16, 21, 29
NLRB v. *Natural Gas Utility District*, 402 U.S. 600 . 27
NLRB v. *Randolph Electric Membership Corp.*, 343 F.2d 60 27
Ocon-Perez v. *INS*, 550 F.2d 1153 41
People v. *Taylor*, 178 Cal. App.2d 472, 3 Cal. Rptr. 186 36
Scarborough v. *United States*, 431 U.S. 563 ..... 9, 18, 21, 27, 29, 41
State v. *Hall*, 301 N.W.2d 729 39
Thrall v. *Wolfe*, 503 F.2d 313, cert. denied, 420 U.S. 972 . 6, 42
United States v. *Andrino*, 497 F.2d 1103 ..... 6, 36
United States v. *Arrington*, 618 F.2d 1119 16
United States v. *Barrett*, 504 F.2d 629, aff'd, 423 U.S. 212 6-7
United States v. *Bass*, 404 U.S. 336 ..... 19, 28
United States v. *Benson*, 605 F.2d 1093 ..... 6, 39
United States v. *Bergeman*, 592 F.2d 533 6
United States v. *Culbert*, 435 U.S. 371 12
United States v. *Fryer*, 545 F.2d 11 16
United States v. *Hayes*, 535 F.2d 479 6

Contents—Continued

Page

United States v. *Herrell*, 588 F.2d 711 ..... 6, 36-37
United States v. *Hoctor*, 487 F.2d 270 37
United States v. *Kelly*, 519 F.2d 794 ..... 6, 37, 40
United States v. *Lehmann*, 613 F.2d 130 6
United States v. *Locke*, 542 F.2d 800 6
United States v. *Matassini*, 565 F.2d 1297 7
United States v. *Mostad*, 485 F.2d 199 7
United States v. *Nardello*, 393 U.S. 286 27
United States v. *Nord*, 586 F.2d 1288 6
United States v. *Padia*, 584 F.2d 85 6
United States v. *Potts*, 528 F.2d 883 ..... 6, 37, 40
United States v. *Purgason*, 565 F.2d 1279 16
United States v. *Turkette*, 452 U.S. 576 11

Statutes and regulations:

Federal Firearms Act, ch. 850, 52 Stat. 1251 (repealed 1968):

Section 2(d) 26
Section 2(e) 26
Section 2(f) 26

Federal Firearms Act Amendments of 1961, Pub. L. No. 87-342, Section 2, 75 Stat. 757 26
Federal Youth Corrections Act, 18 U.S.C. 5005 *et seq.* ... 6
18 U.S.C. 5010 *et seq.* 22
18 U.S.C. 5021 15

Narcotic Addict Rehabilitation Act of 1966:

18 U.S.C. 4251-4255 24
18 U.S.C. 4251(e) 22, 24
18 U.S.C. 4251(f)(1)-(4) 24
18 U.S.C. 4252 24
18 U.S.C. 4253 24
28 U.S.C. 2901-2906 24
28 U.S.C. 2901(f) 22, 24
28 U.S.C. 2902 24

National Firearms Act, 26 U.S.C. 5801 *et seq.* 3

Statutes and regulations—Continued Page

Omnibus Crime Control and Safe Streets Act of 1968, amended by the Gun Control Act of 1968:

Title IV, 18 U.S.C. (& Supp. IV) 921 *et seq.* 2

18 U.S.C. 921-928 3
18 U.S.C. 921(a)(20) 2
18 U.S.C. 922(a) 2
18 U.S.C. 922(a)(6) 40
18 U.S.C. 922(d)(1) 40
18 U.S.C. 922(g) 2, 5, 9, 10, 12, 14, 17, 25, 1a
18 U.S.C. 922(g)(1) ..... *passim*
18 U.S.C. 922(g)(3) 28
18 U.S.C. 922(g)(4) 9, 19
18 U.S.C. 922(h) ..... *passim*
18 U.S.C. 922(h)(1) ..... *passim*
18 U.S.C. 922(h)(3) 28
18 U.S.C. 922(h)(4) 9, 19
18 U.S.C. 923(a) 2
18 U.S.C. 923(c) 29
18 U.S.C. (& Supp. IV) 923(d)(1)(B) . 2,4, 5, 25, 40
18 U.S.C. 923(e) 4
18 U.S.C. 923(f)(1) 4
18 U.S.C. 923(f)(2) 4
18 U.S.C. 923(f)(3) 5
18 U.S.C. 924(a) 2, 5
18 U.S.C. 925(c) . 3, 9, 15, 19, 20, 21, 27, 30, 41, 3a
18 U.S.C. 926 15
18 U.S.C. 927 ..... 41, 42

Title VII, 18 U.S.C. App. 1201 *et seq.*:

18 U.S.C. App. 1202(a)(1) 10, 12, 21, 22, 23
18 U.S.C. App. 1203(2) 10, 15, 21, 22

8 U.S.C. 1251(a)(4) 41
8 U.S.C. 1251(a)(11) 41
18 U.S.C. 841(i) 10, 23
18 U.S.C. 841(i)(1) 23
18 U.S.C. 842(i) 41
18 U.S.C. 845(b) 23, 41
21 U.S.C. 844(b) 10, 23
21 U.S.C. 844(b)(1) 23

Statutes and regulations—Continued Page

Pub. L. No. 89-184, 79 Stat. 788, 15 U.S.C. (Supp. I 1965) 910 21
Alaska Stat. § 12.55.085 (1980) 31, 34

Ariz. Rev. Stat. Ann. (1978):
§ 13-907 ..... 31, 33, 36
§ 13-912 33

Ark. Stat. Ann. § 43-2344 (Repl. 1977) 31, 32, 33, 35
Cal. Health & Safety Code §§ 11357-11361.7 (West Cum. Supp. 1982) 31

Cal. Penal Code (West Supp. 1982):

1203.4 ..... 31, 36
1203.4a 31, 33, 36
1203.45 31

1909 Cal. Stats. 357 22

Cal. Welf. & Inst. Code (West Cum. Supp. 1982):

§ 781 31
§ 1179 31
§ 1772 31
§ 3200 31

Colo. Rev. Stat. (Repl. 1978 & Cum. Supp. 1981):

§ 16-7-401 ..... 31, 32
§ 16-7-403(2) 33

Fla. Stat. Ann. § 948.01 (West 1973 & Cum. Supp. 1982) 31
Idaho Code § 19-2604(1) (1979) 31

Ill. Ann. Stat. (Smith-Hurd Cum. Supp. 1981):

ch. 38, § 206-5 31
ch. 56½, § 1405 31

Ill. Rev. Stat. ch. 56½ § 1402 39
Ind. Code Ann. §§ 35-4-8-1, 35-4-8-3.6 (Burns Cum. Supp. 1981) 31, 34, 35

Statutes and regulations—Continued Page

Iowa Code Ann. (West 1979 & Cum. Supp. 1981):

§ 692.1(5) 38
§ 692.2 38
§ 724.26 39
§ 907.3 ..... 20, 31, 32, 38
§ 907.3(1)(*c*) 38
§ 907.3(1)(*d*) 38
§ 907.4 38
§ 907.9 ..... 31, 38, 39, 3a, 6a

Iowa Code (1975):

§ 789A.1 ..... 3, 38, 3a
§ 789A.1(1) 38
§ 789A.1(*g*) 38, 5a
§ 789A.1(*h*) 38, 5a
§ 789A.6 ..... 3, 30, 38, 6a

Kan. Stat. Ann. (1981):

§ 21-4619 ..... 31, 35
§ 21-4619(d)(2) 33
§ 21-4619(d)(3) 33
§ 21-4619(e)(4) 37
§ 21-4619(g) 36

Md. Ann. Code art. 27, § 737 (Repl. 1976 & Cum. Supp. 1981) 31, 32, 33

Mass. Ann. Laws ch. 276, § 100A (Law. Co-op. 1980 & Cum. Supp. 1982) 31, 32, 33, 34, 35

Mich. Stat. Ann. (Rev. 1978):

§ 28.1274(101) 32, 34
§ 28.1274(102) 31

Minn. Stat. Ann. (West Cum. Supp. 1982):

§ 242.31 31
§ 242.31(2) 37
§ 638.02 33
§ 638.02(2) 31, 33, 34

Statutes and regulations—Continued Page

Nev. Rev. Stat. (1979 & 1981):

§ 179.225 31
§ 179.245 ..... 31, 32
§ 179.245(1) 33
§ 179.245(3) 33, 34
§ 179.255 31
§ 179.255(3) 35
§ 179.285 ..... 31, 34, 35

N.H. Rev. Stat. Ann. § 651:5 (1974 & Cum. Supp. 1981) .. 31, 33, 34

N.J. Stat. Ann. (West Supp. 1981):

§§ 2C:52-1 to 2C:52-32 ..... 31, 34
§ 2C:52-1(a) 35
§ 2C:52-1(b) 32
§ 2C:52-2(a) 32, 33
§ 2C:52-21 35
§ 2C:52-22 35

N.Y. Crim. Proc. Law § 720.35 (McKinney 1971 & Cum. Supp. 1981) 31, 32

N.D. Cent. Code (Repl. 1976):

§ 12-53-18 ..... 31, 32, 33
§ 12-53-19 ..... 31, 37

Ohio Rev. Code Ann. (Page Repl. 1975 & Supp. 1981):

§§ 2953.32-2953.33 ..... 31, 37
§ 2953.32(B) 35
§ 2953.32(C) 33, 34
§ 2953.32(D) 34
§ 2953.32(E) 34
§ 2953.33 34

Okla. Stat. Ann. tit. 22, § 991c (West Cum. Supp. 1981) 31, 32, 34

Statutes and regulations—Continued Page

Tex. Code Crim. Proc. Ann. (Vernon 1979 & Cum. Supp. 1981):
art. 42.12(7) 31, 33, 34, 35
art. 42.13(7) 31

Utah Code Ann. § 77-18-2 (1977) 31
Va. Code § 19.2-392.1-4. (Repl. 1973) 31
Wash. Rev. Code Ann. § 9.95.240 (West 1977 & Cum. Supp. 1982) 31, 33, 34, 37

27 C.F.R.:
Section 178.73 4
Section 178.142 ..... 15, 22

Miscellaneous:

Comment, *Expungement in California: Legislative Neglect and Judicial Misuse of the Statutory Mitigation of Felony Convictions*, 12 U.S.F. L. Rev. 155 (1978) 22, 32
Comment, *Expungement of Criminal Convictions Under the Youth Corrections Act: The Need for Revision*, 66 Ky. L. J. 741 (1978) 32
Gough, *The Expungement of Adjudication Records of Juvenile and Adult Offenders: A Problem of Status*, 1966 Wash. U.L.Q. 147 32
H.R. Rep. No. 488, 90th Cong., 2d Sess. (1968) 26
H.R. Rep. No. 1577, 90th Cong., 2d Sess. (1968) 26
Note, *Prior Convictions and the Gun Control Act of 1968*, 76 Colum. L. Rev. 326 (1976) 13
Op. Att'y Gen. No. 5 (1969) 37
Special Report, *The Collateral Consequences of a Criminal Conviction*, 23 Vand. L. Rev. 929 (1970) 35
S. Rep. No. 82, 75th Cong., 1st Sess. (1937) 26
S. Rep. No. 364, 87th Cong., 1st Sess. (1961) 26
S. Rep. No. 666, 89th Cong., 1st Sess. (1965) 21
S. Rep. No. 997, 74th Cong., 1st Sess. (1935) 26
S. Rep. No. 1097, 90th Cong., 2d Sess. (1968) 26, 27
S. Rep. No. 1501, 90th Cong., 2d Sess. (1968) 25, 26

In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-1180

G.R. DICKERSON, DIRECTOR, BUREAU OF ALCOHOL, TOBACCO AND FIREARMS, PETITIONER

v.

NEW BANNER INSTITUTE, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is reported at 649 F.2d 216. The opinion of the district court (Pet. App. 13a-20a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 6, 1981 (Pet. App. 11a), and a timely petition for rehearing was denied on August 25, 1981 (Pet. App. 12a). On November 9, 1981, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including December 23, 1981. The petition for certiorari was filed on December 22, 1981, and was granted on March 22, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

The relevant statutory provisions are reprinted in an appendix to this brief.

STATEMENT

1. Title IV of the Omnibus Crime Control and Safe Streets Act of 1968, amended by the Gun Control Act of 1968, 18 U.S.C. (& Supp. IV) 921 *et seq.* (hereinafter "Title IV" or "the Gun Control Act"), makes it unlawful for any person "who is under indictment for, or who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year"[1] to ship, transport, or receive any firearm or ammunition in interstate commerce. 18 U.S.C. 922(g) and (h). The Act also makes it unlawful to engage in the business of importing, manufacturing, or dealing in firearms without a license from the Secretary of the Treasury (hereinafter "the Secretary"). 18 U.S.C. 922(a), 923(a). Grounds for denial of a license include the fact that the applicant is barred by 18 U.S.C. 922(g) and (h) from shipping, transporting, and receiving firearms. 18 U.S.C. (& Supp. IV) 923(d)(1)(B). Where the applicant for a license is a corporation, partnership, or association, a license will be denied if an individual possessing power to direct the policies of that entity is subject to the disabilities imposed by Section 922(g) and (h). 18 U.S.C. (& Supp. IV) 923(d)(1)(B). In addition, the Act makes it a crime to violate any provision of the chapter on firearms or to make a willful misrepresentation with respect to information required to be furnished under that chapter. 18 U.S.C. 924(a).

---

[1] The Act provides exemptions for certain business and commercial crimes punishable by imprisonment for more than one year, as well as for state offenses classified as misdemeanors and punishable by imprisonment for two years or less (18 U.S.C. 921(a)(20)).

While the Act imposes disabilities upon any "person who has been convicted of a crime punishable by imprisonment for a term exceeding one year," it permits certain persons in that category to apply to the Secretary of the Treasury for relief from those disabilities. 18 U.S.C. 925(c). The Secretary may grant such relief "if it is established to his satisfaction that the circumstances regarding the conviction, and the applicant's record and reputation, are such that the applicant will not be likely to act in a manner dangerous to public safety and that the granting of the relief would not be contrary to the public interest." *Ibid.* When the Secretary grants relief, he must promptly publish notice in the Federal Register, together with a statement of reasons. 18 U.S.C. 925(c). Relief is not available to a person convicted of a crime involving use of a firearm or other weapon, or a violation of the Gun Control Act, 18 U.S.C. 921-928, or the National Firearms Act, 26 U.S.C. 5801 *et seq.*, 18 U.S.C. 925(c).

2. In September 1974, David Kennison (Director, Chairman of the Board, and a stockholder of respondent New Banner Institute, Inc.) was arrested in Iowa and charged with kidnapping his estranged wife (Pet. App. 2a, 42a, 45a). The kidnapping charge was dismissed, but Kennison pled guilty in Iowa state court to the crime of carrying a concealed weapon (a hand gun), an offense punishable by up to five years' imprisonment (*id.* at 2a). Pursuant to Iowa Code § 789A.1 (1975), the Iowa court accepted Kennison's guilty plea, deferred entry of judgment, and placed him on probation (Pet. App. 2a). Kennison then returned to his residence in South Carolina, where he completed his term of probation. Upon completion of probation in February 1979, he was automatically discharged under Iowa Code § 789A.6 (1975) without entry of judgment, and his criminal record was automatically expunged (Pet. App. 2a).

In May 1976, respondent New Banner filed three applications with the Bureau of Alcohol, Tobacco and Firearms, pursuant to the Gun Control Act, seeking licenses as a dealer in firearms and ammunition, a manufacturer of ammunition, and a collector of curios and relics. On the applications, respondent listed Kennison as a "responsible person," a term defined in the statute as an individual possessing direct or indirect power to control the management or policies of the license applicant (18 U.S.C. (& Supp. IV) 923(d)(1)(B) (Pet. App. 2a). However, in answering a question on the applications that asked whether any such person had been convicted of a crime punishable by a prison term exceeding one year, respondent failed to disclose Kennison's Iowa conviction *(ibid.)*. Based on the information that respondent supplied in the applications, the Bureau issued the licenses (*id.* at 3a).

When the Bureau subsequently learned of Kennison's conviction in Iowa on the concealed weapon charge, it mailed respondent Notices of Contemplated Revocation of Licenses pursuant to 18 U.S.C. 923(e) and (f)(1) and 27 C.F.R. 178.73 (Pet. App. 4a). Following an informal hearing, the Bureau's Regional Regulatory Administrator issued revocation notices *(ibid.)*. Respondent requested and received a formal hearing before an administrative law judge pursuant to 18 U.S.C. 923(f)(2). At the hearing, both the Bureau and respondent presented evidence and legal argument regarding the status of Kennison's conviction (Pet. App. 4a).[2] The Bureau contended

[2] As evidence of the conviction, the Bureau introduced an order of the Iowa court noting that Kennison had entered a plea of guilty to the concealed weapon charge and that he had agreed to probation under the deferred judgment procedure (Gov't Exh. 13). In addition, Kennison testified that he had entered the guilty plea (Resp. Supp. App. 145a).

that respondent's licenses should be revoked both because respondent failed to reveal that Kennison had been convicted of a felony, in violation of 18 U.S.C. 924(a), and because it had not been entitled to licenses in the first place under 18 U.S.C. (& Supp. IV) 923(d)(1)(B) (Pet. App. 4a).

The administrative law judge issued a decision recommending against revocation (Pet. App. 41a-58a). He concluded that respondent's false statements on the application did not justify revocation because respondent's representatives had a good faith belief that Kennison had not been convicted within the meaning of the federal statute and thus lacked the willfulness required by 18 U.S.C. 924(a) (Pet. App. 47a, 50a-52a, 57a). The administrative law judge also concluded that revocation could not be based upon 18 U.S.C. (& Supp. IV) 923(d)(1)(B) because respondent had not been apprised of a possible revocation on that ground (Pet. App. 52a).

On review, the Director of the Bureau agreed that willful misrepresentation had not been shown (Pet. App. 37a). He concluded, however, that respondent's licenses should be revoked on the ground that respondent was ineligible for them under Section 923(d)(1)(B) (Pet. App. 37a-40a). The Director found that Kennison had been convicted in Iowa of an offense that brought him within the prohibitions of 18 U.S.C. 922(g) and (h) (Pet. App. 31a-34a) and that Kennison possessed the power to direct the management and policies of respondent (*id.* at 37a-38a). The Director rejected the administrative law judge's conclusion that respondent had not been notified of a possible revocation under Section 923(d)(1)(B) (Pet. App. 27a-30a). Accordingly, the Director ordered issuance of Final Notices of Revocation (*id.* at 40a).

3. Respondent then petitioned for review under 18 U.S.C. 923(f)(3) in the United States District Court for

the District of South Carolina. Respondent claimed that Kennison lacked the power to direct or cause the direction of its management and policies and that the Director had not complied with provisions of the Act governing notice and opportunity for a hearing prior to license revocation (Pet. App. 15a). The court rejected both claims on the basis of the administrative record and granted summary judgment to the Director (*id.* at 13a-20a).

4. The court of appeals reversed (Pet. App. 1a-10a), concluding that although Kennison had indeed been "convicted of" an offense triggering firearms disabilities, that fact could not serve as a predicate for a Gun Control Act violation or license revocation because his conviction had been expunged under the Iowa deferred judgment procedure.

The court of appeals relied on several decisions holding that convictions set aside under the Federal Youth Corrections Act (18 U.S.C. 5005 *et seq.*) do not constitute convictions for Gun Control Act purposes (Pet. App. 7a-8a). The court acknowledged, however, that the Fifth, Eighth, and Ninth Circuits had held that expunctions under state statutes do not remove federal firearms disabilities *(ibid.)*.[3] The court of appeals also relied upon

---

[3] *United States* v. *Lehmann*, 613 F.2d 130 (5th Cir. 1980); *United States* v. *Benson*, 605 F.2d 1093 (9th Cir. 1979); *United States* v. *Bergeman*, 592 F.2d 533 (9th Cir. 1979); *United States* v. *Herrell*, 588 F.2d 711 (9th Cir. 1978); *United States* v. *Nord*, 586 F.2d 1288 (8th Cir. 1978); *United States* v. *Padia*, 584 F.2d 85 (5th Cir. 1978); *United States* v. *Locke*, 542 F.2d 800 (9th Cir. 1976); *United States* v. *Hayes*, 535 F.2d 479 (8th Cir. 1976); *United States* v. *Potts*, 528 F.2d 883 (9th Cir. 1975); *United States* v. *Kelly*, 519 F.2d 794 (8th Cir. 1975); *United States* v. *Andrino*, 497 F.2d 1103 (9th Cir. 1974). See also *Thrall* v. *Wolfe*, 503 F.2d 313 (7th Cir. 1974), cert. denied, 420 U.S. 972 (1975) (convicted felon pardoned by governor not relieved of disabilities imposed by 18 U.S.C. 922(g)(1) and (h)(1)); *United States* v. *Barrett*, 504 F.2d 629, 632-634 (6th Cir. 1974) (same), aff'd, 423

statements in *Lewis* v. *United States*, 445 U.S. 55, 60-61 & n.5 (1980), that such disabilities may be removed if the conviction is vacated or "the felon is relieved of his disability" by some affirmative action (Pet. App. 6a, 9a). Finally, the court of appeals reasoned that since state convictions trigger the Gun Control Act's disability provisions, expunction of those convictions under state law should also be credited (*id.* at 9a-10a). Accordingly, the court remanded the case to the district court with instructions to vacate the revocation of respondent's licenses (*id.* at 10a).

SUMMARY OF ARGUMENT

I

Under the Gun Control Act, it is unlawful for "any person * * * *who has been* convicted in any court of, a crime punishable by imprisonment for a term exceeding one year" (emphasis added) to ship, transport or receive firearms in interstate commerce (18 U.S.C. 922(g)(1) and (h)(1)) unless special relief is granted by the Secretary of the Treasury (18 U.S.C. 925(c)). Absent that relief, such persons and the entities they control also are ineligible for licenses to engage in firearms-related businesses (18 U.S.C. (& Supp. IV) 923(d)(1)(B)).

The question in this case is the meaning of the phrase "any person * * * who has been convicted." The answer to that question is clear. A person who "has been convicted" of a qualifying state offense but whose conviction is later "expunged" under a state expunction statute neverthe-

---

U.S. 212 (1976) (issue not reached); *United States* v. *Mostad*, 485 F.2d 199 (8th Cir. 1973) (state statutory pardon). But see *United States* v. *Matassini*, 565 F.2d 1297 (5th Cir. 1978). Cf. *Carlesi* v. *New York*, 233 U.S. 51 (1914) (convicted felon pardoned by President may be considered under state repeat offender statute).

less remains a person who "has been convicted," and thus the state expunction does not automatically relieve him of his federal firearms disabilities. As this Court acknowledged in *Lewis* v. *United States*, 445 U.S. 55, 60-65 (1980), there is no ambiguity in the plain meaning of the relevant statutory language.

In *Lewis*, this Court recognized an obvious, "commonsense" exception to the statutory language for persons whose convictions have been reversed or vacated on appeal or on collateral attack (445 U.S. at 60-61 & n.5), but that exception is not applicable to persons whose convictions have been expunged. Unlike the reversal or vacation of a conviction due to error in the earlier proceedings, expunction does not call into question the validity of the conviction. Nor does it signify that the defendant did not commit the offense for which he was convicted, that he lacked moral culpability for the offense, or that he now poses no greater threat to the community than any other person. For federal purposes, the relevant event is the determination, after formal state proceedings, that the defendant committed a serious criminal violation. It is immaterial that the state subsequently may provide a mechanism for removing some of the state-created collateral consequences of that conviction.

Accordingly, it was not inconsistent for Congress to use state convictions to trigger federal firearms disabilities while making no provision for the automatic removal of disabilities when those convictions are expunged. The fact of conviction merely provides a rough but convenient benchmark for identifying certain persons who are much more likely to misuse firearms than is the average person. Disabilities are imposed upon such persons as a result of their convictions, but relief may be granted by the Secretary of the Treasury in those cases in which he finds that an undue risk would not be created.

Having provided this relief mechanism, which focuses directly upon whether the person in question can be trusted with firearms, Congress saw no need automatically to credit state expunctions, which may be granted without any consideration of questions relating to firearms.

II

Not only does the key statutory language show that Congress did not intend state expunctions to remove federal firearms disabilities, but other provisions of Title IV and Title VII reinforce that conclusion. This Court has previously noted that Congress carefully distinguished between present status and past occurrences in framing 18 U.S.C. 922(g) and (h). See *Scarborough* v. *United States*, 431 U.S. 563, 570 (1977); *Barrett* v. *United States*, 423 U.S. 212, 216-217 (1976). Thus, if Congress had wished to impose disabilities upon only those persons with outstanding state convictions, rather than "any person * * * who has been convicted," Congress certainly knew how to do so. Furthermore, the same disabilities imposed upon convicted persons are also imposed by statute upon anyone who "has been adjudicated as a mental defective" or who "has been committed to a mental institution" (18 U.S.C. 922(g)(4) and (h)(4)), and the statute contains no provision dissolving those disabilities once the person in question is adjudged competent or released. Those provisions parallel our construction of the sections relating to convicted persons and illustrate the overall congressional plan.

Similarly, the provision permitting the Secretary of the Treasury to grant relief only in cases involving certain offenses and only after an inquiry focused narrowly upon questions relating to firearms (18 U.S.C. 925(c)) is inconsistent with removing firearms disabilities automatically whenever a state grants an expunction, no

matter what the underlying offense or the basis for the state's action. In addition, by providing an express exemption from identical language in 18 U.S.C. App. 1202(a)(1) for certain presidential and gubernatorial pardons (see 18 U.S.C. App. 1203(2)), Congress clearly indicated that no analogous automatic exceptions, such as for expunctions, were intended with respect to 18 U.S.C. 922(g) and (h).

Finally, it is revealing that a federal expunction statute (21 U.S.C. 844(b)) contains a provision specifying that expunction under that law removes disqualifications and disabilities resulting from conviction. Obviously, that provision would have been superfluous if Congress had felt that expunction of a conviction automatically removed those disqualifications and disabilities. Furthermore, the federal expunction statute was enacted within two weeks of laws that concern the shipment, transportation, and receipt of explosives (18 U.S.C. 841(i)) and that were patterned closely after the firearms provisions at issue here. Thus, the absence from those explosives laws of a provision excepting persons with expunged convictions is strong proof that neither those laws nor their statutory model were intended to be subject to such limitations.

III

If, contrary to our view, effect must be given to state expunctions, it would be necessary for the federal courts to decide on a state-by-state basis whether expunction was intended to remove federal firearms disabilities. More than half the states have enacted expunction laws, and these laws differ in almost every particular. It is not apparent that any of these statutes remove all the myriad legal and practical consequences of conviction, and none provides a comprehensive list of those disabilities that are

removed and those that remain. While some statutes clearly indicate that expunction does not eliminate firearms disabilities imposed by state law, many, like the Iowa statute at issue here, are unclear on that point, and frequently, as in the case of Iowa, state court decisions do not address this question. Thus, determining whether state expunctions were meant to remove firearms disabilities would be a difficult and speculative chore.

In addition, enforcement of the federal firearms laws would be hampered if their reach depended on state law. Without a definitive federal court decision concerning each state statute, the Secretary of the Treasury would not know whether persons with expunged convictions were eligible for licenses, and law enforcement officers and prosecutors would not know whether such persons were guilty of federal crimes. Finally, persons with expunged state convictions would be uncertain about their status. Such confusion would disrupt Congress' carefully constructed plan for enforcing the Gun Control Act and is squarely contrary to Congress' clear intent.

ARGUMENT

THE DISABILITIES IMPOSED BY THE GUN CONTROL ACT UPON ANY PERSON WHO "HAS BEEN CONVICTED" OF CERTAIN CRIMES ARE NOT AUTOMATICALLY REMOVED BY THE EXPUNCTION OF THE CONVICTION UNDER A STATE STATUTE

A. The Language Of 18 U.S.C. 922(g)(1) and (h)(1) Unambiguously Applies To Any Person Who Has Been Convicted Of A State Offense Punishable By More Than One Year's Imprisonment Even If The Conviction Has Been "Expunged" Under State Law

As this Court has frequently noted (*United States* v. *Turkette*, 452 U.S. 576, 580 (1981)) (citation omitted):

> In determining the scope of a statute, we look first to its language. If the statutory language is unambiguous, in the absence of "a clearly expressed legisla-

> tive intent to the contrary, that language must ordinarily be regarded as conclusive."

See also, *e.g.*, *Consumer Product Safety Commission* v. *GTE Sylvania*, 447 U.S. 102, 108 (1980); *Lewis* v. *United States*, 445 U.S. 55, 61 (1980).

In this case, the pertinent statutory language is perfectly clear. 18 U.S.C. 922(g) and (h) make it unlawful for certain persons to ship, transport, or receive firearms in interstate commerce. Included among the persons subject to those disabilities is "any person * * * who *has been convicted* in any court of, a crime punishable by imprisonment for a term exceeding one year" (emphasis added) (18 U.S.C. 922(g)(1) and (h)(1)). Discussing essentially identical language in 18 U.S.C. App. 1202(a)(1), a similar and partially overlapping gun control statute, this Court has stated (*Lewis* v. *United States*, *supra*, 445 U.S. at 60): "No modifier is present, and nothing suggests any restriction on the scope of the term 'convicted.' Nothing on the face of the statute suggests a congressional intent to limit its coverage to persons [whose convictions (have not been expunged)]' " (*id.* at 60, *quoting United States* v. *Culbert*, 435 U.S. 371, 373 (1978)). When a conviction is "expunged" under state law, that does not alter the historical fact that the person in question "has been convicted." See *Hyland* v. *Fukuda*, 580 F.2d 977, 980 (9th Cir. 1978).

Any basis for contending that there is ambiguity in the statutory language was eliminated by this Court's decision in *Lewis* v. *United States*, *supra*. Construing 18 U.S.C. App. 1202(a)(1), which imposes firearms disabilities upon any person "who has been convicted" of a felony, the Court held that the plain meaning of the statute encompassed persons with convictions subject to collateral attack on constitutional grounds. The dissent contended that the statute was unclear because "[t]he

provision on its face admits of no exception to its sweeping proscription" but "the statute cannot be interpreted so as to include those persons whose predicate convictions have been vacated or reversed on appeal" (445 U.S. at 69). The Court, however, rejected the contention that that "common-sense" exception destroyed the clarity of the statutory language (*id.* at 60-61 & n.5). As the Court succinctly put it (*id.* at 65): "There is no ambiguity here."

The exception for persons whose predicate convictions have been vacated or reversed on appeal or collateral attack does not introduce ambiguity into the statutory language because the exception is "so obvious." See Note, *Prior Convictions and the Gun Control Act of 1968*, 76 Colum. L. Rev. 326, 334 n.42 (1976). When a conviction is vacated or reversed on appeal or on collateral attack, it is because the conviction was not obtained in conformity with the law, and it is patent that neither the federal government nor the states may constitutionally attach the same disabilities to a conviction after it is adjudged unlawful for reasons casting doubt upon its reliability. Undoubtedly that rule was so obvious that Congress saw no need to address it in framing the statutory language. A conviction that has been expunged, however, stands on an entirely different footing. Expunction does not call into question the legality of the previous conviction, and it does not signify that the defendant was innocent of the crime for which he was convicted. As explained below (pages 30-35, *infra*), expunction merely means that the responsible jurisdiction has decided not to accord the conviction certain continuing effects. There seems little doubt that firearms disabilities may constitutionally be attached to an expunged conviction (see *Lewis* v. *United States*, *supra*, 445 U.S. at 65-68), and an exception for such convictions, unlike convictions reversed or vacated due to legal error, is far from obvious. Accordingly, 18

U.S.C. 922(g)(1) and (h)(1), which impose disabilities upon "any person who has been convicted" of a qualifying offense, apply unambiguously to a person whose conviction has been expunged.

The court below relied upon statements in *Lewis* v. *United States*, *supra*, to support its holding that expunction of a state conviction automatically eliminates the disabilities imposed by 18 U.S.C. 922(g) and (h) (see Pet. App. 6a, 9a). Referring to the federal gun control laws, this Court wrote in *Lewis* (445 U.S. at 60-61; footnote omitted): "The statutory language is sweeping, and its plain meaning is that the fact of a felony conviction imposes a firearm disability until the conviction is vacated or the felon is relieved of his disability by some affirmative action, such as a qualifying pardon or a consent from the Secretary of the Treasury." The court of appeals apparently read this statement to mean that a person can no longer be viewed as someone who "has been convicted" if his conviction is "vacated" or wiped away by the "affirmative action" of a state expunction statute (see Pet. App. 6a). It is apparent, however, that the court of appeals misinterpreted this Court's words. In speaking of convictions that have been "vacated," the Court was referring to the obvious exception to the statutory language discussed above and, as noted, that exception is confined to convictions vacated or reversed due to error in the prior proceedings. Clearly this is how the dissent in *Lewis* construed the Court's language, because it wrote (445 U.S. at 69; emphasis added): "[T]he Court concedes—as it must—that the statute cannot be interpreted so as to include those persons whose predicate convictions have been *vacated or reversed on appeal*. *Ante*, at 60-61, and n.5."

The reference to "affirmative action" also is inapplicable to expunction under state statutes. The term

"affirmative action" was not meant as an interpretation of the statutory phrase "any person * * * who has been convicted." In the preceding sentences, the Court explained that a person whose conviction is subject to collateral attack on constitutional grounds nevertheless falls within the statute's plain meaning because he remains a person "who has been convicted" (445 U.S. at 60). Thus, the Court could hardly have intended to suggest that the plain meaning of the statutory language does not encompass a person who has received "a qualifying pardon or a consent from the Secretary of the Treasury" (*id.* at 60-61). Rather than placing a gloss upon the statutory language "any person * * * who has been convicted," the Court merely was summarizing various provisions of the federal gun control laws. In mentioning "a qualifying pardon," the Court was referring to 18 U.S.C. App. 1203(2), which grants an exemption from Title VII to recipients of certain presidential and gubernatorial pardons. In mentioning affirmative action by the Secretary of the Treasury, the Court was referring to 18 U.S.C. 925(c), which empowers the Secretary in certain cases to grant relief from the disabilities imposed by the federal gun control laws. Because no provision of the federal gun control laws provides an automatic exemption or automatic relief for persons with expunged state convictions, the reference to "some affirmative action"[4] does not support the result reached below.

---

[4] In addition to the affirmative actions specifically mentioned in the opinion, the Court may have had in mind relief provisions promulgated by the Secretary of the Treasury pursuant to his authority to issue regulations implementing Title IV (see 18 U.S.C. 926) and his authority to grant relief from federal firearms disabilities where appropriate (18 U.S.C. 925(c)). The Secretary has exercised his authority by issuing a regulation (27 C.F.R. 178.142) providing that a presidential pardon removes Title IV firearms disabilities.

The second statement in *Lewis* upon which the court of appeals relied is similar and similarly inapplicable to the present case. This Court wrote (445 U.S. at 61 n.5) that "a disability based upon one's status as a convicted felon should cease only when the conviction upon which that status depends has been vacated." The court of appeals thought that the term "vacated" encompassed an "unconditional expunction" (Pet. App. 9a), but, as with the statement discussed above, there is little doubt that the term "vacated," in context, referred only to a conviction overturned due to error in the earlier proceedings. In the same footnote in which the statement in question appears, the Court referred to a conviction "reversed on appeal." And, as noted, the dissent construed the footnote, as well as the previously discussed statement in text, to refer to convictions "vacated or reversed on appeal" (*id.* at 69 (Brennan, J., dissenting)).[5]

---

[5] In construing 18 U.S.C. 922(g)(1) and (h)(1), the court of appeals relied upon several lower court decisions holding that convictions "set aside" under a provision of the Federal Youth Corrections Act, 18 U.S.C. 5021, do not impose federal firearms disabilities. See *United States* v. *Arrington*, 618 F.2d 1119 (5th Cir. 1980); *United States* v. *Purgason*, 565 F.2d 1279 (4th Cir. 1977); *United States* v. *Fryer*, 545 F.2d 11 (6th Cir. 1976). We doubt that those cases were correctly decided, and in any event they are readily distinguishable from the present case. The Youth Corrections Act cases involved a single *federal* enactment that provides a uniform procedure for setting aside the convictions of certain youth offenders. By contrast, *state* expunction statutes vary widely; most are not limited to youth offenders; and many permit the expunction of a conviction for any offense including a violent crime committed with a firearm (see pages 30-35, *infra*). Thus, even if Congress intended to give certain youth offenders a fresh start and even if Congress judged that certain persons convicted during their youth may not pose the same continuing risk as other persons convicted of comparable offenses, that hardly means that Congress intended to remove federal firearms disabilities from any person whose conviction is expunged under

B. Other Provisions Of The Federal Gun Control Laws And Related Federal Statutes Reinforce The Conclusion That Expunction Of A Qualifying State Conviction Was Not Intended Automatically To Remove The Federal Firearms Disabilities Resulting From That Conviction

Even if there were some ambiguity in the phrase "any person * * * who has been convicted" in 18 U.S.C. 922(g)(1) and (h)(1), other provisions of the federal gun control laws leave little doubt that expunction of a qualifying state conviction was not intended automatically to remove the disabilities resulting from that conviction.

The remaining provisions of 18 U.S.C. 922(g) and (h) provide a starting place for analysis. Under those provisions, the same disabilities imposed upon persons convicted of offenses punishable by more than a year's imprisonment are also applicable to any person

> (1) who is under indictment for * * * a crime punishable by imprisonment for a term exceeding one year;
>
> (2) who is a fugitive from justice;
>
> (3) who is an unlawful user of or addicted to marihuana or any depressant or stimulant drug * * * or narcotic drug * * *; or
>
> (4) who has been adjudicated as a mental defective or who has been committed to a mental institution.

---

state law regardless of the offender's age at the time of conviction, the nature of his offense, or the reason for the expunction. Furthermore, crediting the setting aside of convictions under the Federal Youth Corrections Act would not create the same nightmarish problems of enforcement that would result if it were necessary to determine whether each of the disparate state expunction statutes was intended to remove federal firearms disabilities (see pages 30-41, *infra*).

These provisions show that Congress chose its language carefully to distinguish between present status and the occurrence of past events. Congress referred, on the one hand, to any person "who *is* under indictment," "who *is* a fugitive," or "who *is* an unlawful user of or addicted to" certain drugs. On the other hand, Congress referred to any person "who *has been* convicted," "who *has been* adjudicated as a mental defective," or "who *has been* committed to a mental institution." Thus, Congress must have been aware of the plain meaning of the tense it employed and would have created express exemptions if it had intended these provisions to have a more limited reach. See *Lehman* v. *Nakshian*, 453 U.S. 156, 162 (1981); *FTC* v. *Sun Oil Co.*, 371 U.S. 505, 514-515 (1963). This Court has previously relied upon Congress' careful choice of tenses in Section 922(h). In *Barrett* v. *United States*, 423 U.S. 212, 216-217 (1976), the Court noted that the act proscribed by that section—" 'to receive any firearm' "—is in the present tense. The Court then stated (*id.* at 217):

> Congress knew the significance and meaning of the language it employed. It used the present perfect tense elsewhere in the same section, namely, in § 922(h)(1) (a person who "has been convicted"), and in § 922(h)(4) (a person who "has been adjudicated" or who "has been committed"), in contrast to its use of the present tense ("who is") in §§ 922(h)(1), (2), and (3). The statute's pattern is consistent and no unintended misuse of language or of tense is apparent.

The Court returned to the same point in *Scarborough* v. *United States*, 431 U.S. 563, 570 (1977), noting: "It is obvious that the tenses used throughout Title IV were chosen with care."

The court of appeals' interpretation of 18 U.S.C. 922(g)(1) and (h)(1) also seems squarely inconsistent with

18 U.S.C. 922(g)(4) and (h)(4), which impose continuing disabilities upon any person "who *has been* adjudicated as a mental defective or who *has been* committed to a mental institution." Congress undoubtedly was aware that persons adjudicated as mental defectives may subsequently be found to be competent and that persons committed to mental institutions are frequently cured and released. Congress nevertheless made no exception for such cases, apparently concluding that anyone "who has been adjudicated as a mental defective or who has been committed to a mental institution" is too "risky" (*United States* v. *Bass*, 404 U.S. 336, 344-345 (1971) (Title VII)) to be permitted to ship, transport, or receive firearms or ammunition in interstate commerce. Since Congress imposed disabilities upon such persons, even though they may be fully rehabilitated (and may never have posed a danger to anyone else), it is difficult to believe that Congress intended to exempt, for example, a person who was convicted of a violent crime involving the use of a firearm but whose conviction subsequently was expunged, for whatever reason,[6] under state law.

18 U.S.C. 925(c), to which we have previously referred, provides additional evidence that expunction of a qualifying state conviction was not intended automatically to remove the disabilities imposed by the federal gun control laws. Section 925(c) empowers the Secretary of the Treasury to grant relief from those disabilities in certain cases. However, relief may not be granted to a person convicted of a crime involving the use of a firearm or of a federal firearms offense. Furthermore, before relief is granted, it must be established to the Secretary's

[6] As noted below (see pages 31-32 & note 22, *infra*), some state statutes permit expunction of convictions for any crime, including murder.

satisfaction "that the circumstances regarding the conviction, and the applicant's record and reputation, are such that the applicant will not be likely to act in a manner dangerous to public safety and that the granting of the relief would not be contrary to the public interest." Since Congress precluded the Secretary from granting relief to persons convicted of crimes involving firearms, it is unlikely that Congress intended to exempt expunged state convictions, no matter what the nature of the offense.[7] Moreover, since the Secretary may not grant relief without making a determination relating to the specific relief requested—*i.e.*, permission to acquire, receive, transfer, ship, or possess firearms—it seems unlikely that Congress intended to credit state expunctions that may have been made without any consideration of problems concerning firearms.[8] In addition, if state expunctions automatically removed federal firearms disabilities, a person subject to such disabilities could circumvent the statutory relief procedure by applying to the state for expunction. And a decision by the Secretary denying relief under 18 U.S.C. 925(c) could be overruled in effect by state authorities. It is doubtful that Congress

---

[7] As noted below (see pages 31-32, *infra*), some states permit the expunction of a conviction for any offense, including a violent crime committed with a firearm. While the Iowa deferred judgment statute at issue here is more limited, it appears that persons convicted of certain firearms crimes, such as assault with a firearm, are eligible for expunction (see Iowa Code Ann. § 907.3 (West 1979 & Cum. Supp. 1981), even though the Secretary of the Treasury could not grant relief under those circumstances (see 18 U.S.C. 925(c)).

[8] As noted below (see pages 32-33, *infra*), some statutes provide for automatic expunction under certain circumstances. Of those that confer discretion upon the expunging authority, most fail to specify the basis upon which the decision is to be made or the factors to be considered, while others do so only in extremely general terms.

intended such clearly anomalous results. On the contrary, the Senate Report issued prior to the passage of the provision from which Section 925(c) derives (Pub. L. No. 89-184, 79 Stat. 788, 15 U.S.C. (Supp. I 1965) 910) appears to assume that no other means of relief from federal firearms disabilities would be available. S. Rep. No. 666, 89th Cong., 1st Sess. 2 (1965).

Finally, provisions of Title VII of the Omnibus Crime Control and Safe Streets Act of 1968, which was enacted simultaneously with Title IV, reinforce the conclusion that state expunctions were not intended automatically to confer relief upon persons subject to federal firearms disabilities.[9] A provision of Title VII, 18 U.S.C. App. 1202(a)(1), makes it a crime for "[a]ny person who * * * has been convicted * * * of a felony" to receive, possess, or transport a firearm in commerce. However, 18 U.S.C. App. 1203(2) exempts "any person who has been pardoned by the President of the United States or the chief executive of a State and has expressly been authorized by the President or such chief executive, as the case may be, to receive, possess, or transport in commerce a firearm."

These provisions cannot easily be squared with the court of appeals' decision in this case. By providing an express exemption from 18 U.S.C. App. 1203(2) for persons who have received qualifying pardons, Congress clearly indicated its belief either that such persons have been convicted or, at least, that their status is sufficiently unclear that clarification is required. It therefore seems almost inconceivable that Congress could have reached

---

[9] This Court has previously treated these enactments as *in pari materia* in construing statutory language identical to that at issue here. *Lewis* v. *United States*, *supra*, 445 U.S. at 61-62. But see *Scarborough* v. *United States*, *supra*, 431 U.S. at 569 (comparisons not meaningful in construing interstate commerce elements).

contrary conclusions concerning persons with expunged convictions. Nor is it likely that Congress was simply unaware of expunctions, since expunctions were neither new nor unusual in 1968 when Title IV and Title VII were enacted. [10] Thus, by expressly exempting persons with qualifying pardons, Congress implicitly ruled out other, analogous exemptions, such as for persons whose convictions have been expunged. That conclusion is buttressed by the fact that Congress carefully specified that not all presidential or gubernatorial pardons are sufficient to provide an exemption from 18 U.S.C. App. 1203(2). It is doubtful that Congress intended to credit any "unconditional expunction," as the court of appeals concluded (Pet. App. 9a), while refusing to honor, for example, any presidential pardon that lacks an express authorization "to receive, possess, or transport in commerce a firearm."

Of course, the exemption provided in 18 U.S.C. App. 1203(2) applies only to 18 U.S.C. App. 1202(a)(1) and not to 18 U.S.C. 922(g)(1) and (h)(1), the provisions at issue here. [11] However, both 18 U.S.C. App. 1202(a)(1), on the one hand, and 18 U.S.C. 922(g)(1) and (h)(1), on the other, refer to any person "who has been convicted," and there is no reason to believe that this key language was intended

---

[10] For example, a California expunction law (Act of Mar. 13, 1909, ch. 232, § 1, 1909 Cal. Stats. 357), apparently the nation's first (Comment, *Expungement in California: Legislative Neglect and Judicial Misuse of the Statutory Mitigation of Felony Convictions*, 12 U.S.F.L. Rev. 155, 161 (1978)), was enacted in 1909. The Federal Youth Corrections Act, 18 U.S.C. 5010 *et seq.*, was enacted in 1950. See also 18 U.S.C. 4251(e) and 28 U.S.C. 2901(f) (special exception for expunged convictions) enacted in 1966.

[11] However, by regulation (27 C.F.R. 178.142), presidential pardons automatically remove Title IV disabilities as well (see page 15, note 4, *supra*).

to have a radically different meaning in the two statutes. It therefore follows, under 18 U.S.C. 922(g)(1) and (h)(1) as well as under 18 U.S.C. App. 1202(a)(1), that a person whose conviction has been expunged under state law is nevertheless a person "who has been convicted" for federal firearms purposes.

Any lingering doubts about this conclusion are dispelled by 21 U.S.C. 844(b), a federal expunction statute. That statute provides that a first offender found guilty of simple possession of a controlled substance may be placed on probation without entry of judgment and that, upon the successful completion of probation, "the court shall discharge [the offender] and dismiss the proceedings against him" (21 U.S.C. 844(b)(1)). Congress also specified that "[s]uch discharge or dismissal shall not be deemed a conviction for purposes of disqualifications or disabilities imposed by law upon conviction of a crime" (21 U.S.C. 844(b)(1)). Obviously the latter provision would have been superfluous if Congress had believed that expunction automatically removed the "disqualifications and disabilities" resulting from conviction.

Moreover, 21 U.S.C. 844(b) was enacted just 12 days after 18 U.S.C. 841(i), a provision pertaining to explosives and patterned after the firearms provisions at issue in this case. 18 U.S.C. 841(i)(1) makes it unlawful for "any person * * * who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year" to ship, transport, or receive any explosive in interstate commerce. As in the case of Title IV, no exception is made for expunged convictions, but the Secretary of the Treasury is empowered to grant relief where appropriate (18 U.S.C. 845(b)). In light of the contemporaneous enactment of 21 U.S.C. 844(b), the absence of a provision excepting persons with expunged state convictions from the reach of 18 U.S.C. 841(i)(1) is

strong proof that neither that provision nor its statutory model was intended to be subject to such limitations. See *American Textile Manufacturers Institute* v. *Donovan*, 452 U.S. 490, 510-511 (1981).

Congress took a similar approach two years earlier in the Narcotic Addict Rehabilitation Act of 1966, 18 U.S.C. 4251-4255, 28 U.S.C. 2901-2906, which permits special treatment of narcotics addicts charged with or convicted of certain offenses. Persons previously "convicted" of certain felonies and those who have not fully served any sentence following "conviction" are ineligible for treatment under the Act (18 U.S.C. 4251(f)(1)-(4), 4252, 4253; 28 U.S.C. 2901(f), 2902). However, Congress was careful to specify that the terms "convicted" and "conviction" "do not include a final judgment which has been expunged by pardon, reversed, set aside, or otherwise rendered nugatory" (18 U.S.C. 4251(e); 28 U.S.C. 2901(f). Thus, as these provisions demonstrate, Congress knew the plain meaning of terms such as those employed in 18 U.S.C. 922(g)(1) and (h)(1), and when it wished to create an exemption for expunged convictions it did so expressly.

C. The Purpose And History Of The Gun Control Act Are Inconsistent With The Automatic Removal Of Federal Firearms Disabilities Based Upon State Expunctions

"As in all cases of statutory construction," the Court's "task is to interpret the words of [the statute] in light of the purposes Congress sought to serve." *Chapman* v. *Houston Welfare Rights Organization*, 441 U.S. 600, 608 (1979). In previous cases concerning the Gun Control Act, this Court has acknowledged the statute's broad prophylactic purpose:

> When Congress enacted [18 U.S.C. 921 *et seq.*], it was concerned with the widespread traffic in fire-

> arms and with their general availability to those whose possession thereof was contrary to the public interest. * * * The principal purpose of the federal gun control legislation, therefore, was to curb crime by keeping "firearms out of the hands of those not legally entitled to possess them because of age, criminal background, or incompetency."

Huddleston v. *United States*, 415 U.S. 814, 824 (1974), quoting S. Rep. No. 1501, 90th Cong., 2d Sess. 22 (1968). See also *Barrett* v. *United States*, 423 U.S. 212, 220-221 (1976).

To accomplish this goal, Congress determined that firearms must be kept away from persons who might be expected to misuse them, such as those convicted of serious crimes. Thus, the Act forbids a person convicted in any court of a crime punishable by more than one year in prison to ship, transport, or receive any firearm or ammunition in interstate or foreign commerce. 18 U.S.C. 922(g) and (h). Consistent with this prohibition, such convicted persons are also barred from obtaining licenses to deal in firearms or ammunition. 18 U.S.C. (& Supp. IV) 923(d)(1)(B). This latter provision is particularly important because the Act funnels access to firearms almost exclusively through dealers. *Huddleston* v. *United States*, *supra*, 415 U.S. at 825. As the Court has observed (*id.* at 824), "[t]he principal agent of federal enforcement is the dealer." Therefore, Congress' desire to keep firearms out of the hands of those who might misuse them is particularly important in this case, which involves applications for licenses to deal in guns and ammunition.

We have found nothing in the legislative history of the Gun Control Act or related federal firearms laws that even faintly suggests that state expunctions were intended automatically to remove the disabilities imposed

by 18 U.S.C. 922(g)(1) and (h)(1), [12] and neither the court below nor respondent has cited any such proof. This lack of evidence is highly significant for several reasons. First, the purpose of the Gun Control Act will be frustrated by the decision of the court of appeals. That decision would require the Secretary to grant dealer and manufacturer licenses to organizations directed by individuals convicted of serious criminal offenses (or to such individuals themselves) whenever the conviction in question has been expunged under state law. This would result even though state expunctions typically do not focus upon the question with which the Gun Control Act is concerned, *i.e.*, whether the convicted person is fit to engage in the firearms business or to possess, ship, transport, or re-

[12] The Federal Firearms Act, ch. 850, Section 2(d), (e), and (f), 52 Stat. 1251 (repealed 1968), imposed firearms disabilities upon "any person * * * who has been convicted of a crime of violence." In 1961, that provision was amended to impose disabilities upon any person convicted of a "crime punishable by imprisonment for a term exceeding one year" (Pub. L. No. 87-342, Section 2, 75 Stat. 757). The legislative history of these enactments reveals no intent to create exceptions for state expunction procedures. See S. Rep. No. 997, 74th Cong., 1st Sess. (1935); S. Rep. No. 82, 75th Cong., 1st Sess. (1937); S. Rep. No. 364, 87th Cong., 1st Sess. (1961). In expanding the covered offenses beyond crimes of violence, Congress intended to give federal authorities "additional jurisdiction to assist local authorities in the common assault against crime." It chose the new punishment-oriented classification because that would include "any crime which measures up to the Federal standard of a felony; that is, any crime punishable by imprisonment for a term exceeding [one] year." S. Rep. No. 364, *supra*, at 2.

In like manner, there is nothing in the legislative history of the Omnibus Crime Control and Safe Streets Act of 1968 or the Gun Control Act to suggest that Congress wished to credit state expunctions. See S. Rep. No. 1501, 90th Cong., 2d Sess. (1968); S. Rep. No. 1097, 90th Cong., 2d Sess. (1968); H.R. Rep. No. 1577, 90th Cong., 2d Sess. (1968); H.R. Rep. No. 488, 90th Cong., 2d Sess. (1968).

ceive firearms. See pages 28-29, 32-33 & notes 30, 31, *infra*.

Second, the lack of any proof that Congress intended that state expunctions be credited is significant because " '[i]n the absence of a plain indication to the contrary * * * it is to be assumed when Congress enacts a statute that it does not intend to make its application dependent on state law.' " *NLRB* v. *Natural Gas Utility District*, 402 U.S. 600, 603 (1971), quoting *NLRB* v. *Randolph Electric Membership Corp.*, 343 F.2d 60 (4th Cir. 1965). Accord, *United States* v. *Nardello*, 393 U.S. 286, 289-296 (1969). In *Jerome* v. *United States*, 318 U.S. 101, 104 (1943), the Court explained the reason for this rule: "That assumption is based on the fact that the application of federal legislation is nationwide and at times on the fact that the federal program would be impaired if state law were to control" (citations omitted). We explain below (see pages 39-41, *infra*) how application of state law in the present context would impair the federal gun control scheme. Furthermore, the legislative history reveals that Congress believed a uniform national program was necessary to assist in curbing the illegal use of firearms. See S. Rep. No. 1097, 90th Cong., 2d Sess. 28, 76-77 (1968).

Finally, the lack of any indication that Congress intended state expunction laws to remove Gun Control Act disabilities is telling because Title IV "is a carefully constructed package of gun control legislation. * * * 'Congress knew the significance and meaning of the language it employed.' " *Scarborough* v. *United States*, *supra*, 431 U.S. at 570. As noted, Congress carefully crafted a procedure for removing those disabilities in appropriate cases (see 18 U.S.C. 925(c)) where an exemption would not undermine the Act's broad purpose.

The court of appeals concluded that crediting state expunctions was consistent with Congress' purpose be-

cause state convictions are used to trigger the Act's disabilities in the first place (see Pet. App. 9a-10a). While the court's reasoning has some surface appeal, it is based upon a serious misunderstanding of Congress' intent and the regulatory scheme it employed. State convictions were used to trigger firearms disabilities, not because Congress wanted to tie those disabilities to the intricacies of state law, but because such convictions provide an inexact but convenient way of identifying "especially risky people" (*United States* v. *Bass*, *supra*, 404 U.S. at 345), and an easy means of proving their riskiness in administrative or judicial proceedings. Where there was no such convenient benchmark of risk—as in the case of persons who use or are addicted to certain drugs (18 U.S.C. 922(g)(3) and (h)(3))—Congress was forced to rely upon the underlying behavior that led to the presumption that the person could not be trusted with firearms. Moreover, Congress could reasonably have assumed that the criteria for conviction of a qualifying offense do not vary greatly from state to state and that all such convictions must be obtained at proceedings governed by uniform constitutional standards, including proof of guilt beyond a reasonable doubt. See *Jackson* v. *Virginia*, 443 U.S. 307 (1979).

Thus, since Congress relied upon state convictions merely as a rough but rational way of singling out persons who are especially "irresponsible and dangerous" (*Barrett* v. *United States*, *supra*, 423 U.S. at 218), there is no inconsistency in Congress' refusal to be bound by subsequent state actions, such as expunctions, that (as we show below) vary widely from state to state, are not subject to minimum federal standards, and do not provide sufficient assurance that the person in question no longer poses an unacceptable risk of dangerousness. Congress was entitled to conclude that anyone convicted of a

qualifying offense (and whose conviction had not been reversed or vacated due to error at trial) is presumptively too risky to be trusted with firearms.[13] See *Lewis* v. *United States*, *supra*, 445 U.S. at 65-68. However, recognizing the potential harshness of that rule in individual cases, Congress empowered the Secretary of the Treasury to grant relief where appropriate (18 U.S.C. 923(c)), based upon uniform federal standards. Title IV "is a carefully constructed package of gun control legislation" (*Scarborough* v. *United States*, *supra*, 431 U.S. at 570), and when the statutory scheme is understood it becomes apparent that Congress' use of state convictions to trigger firearms disabilities is fully consistent with Congress' refusal to credit state expunctions.

Automatically crediting state expunctions, on the other hand, would be inconsistent with Congress' plan, as the present case well illustrates. Here, Kennison was charged with the serious crime of kidnapping. For reasons that do not appear in the record, he was permitted, as part of a plea bargain, to plead guilty to illegal possession of a concealed weapon, *i.e.*, a hand gun. Because he had "stable employment" and no previous convictions[14] and because of the "unusual circumstances of this case," the court deferred entry of judgment and placed him on probation (Pet. App. 45a; Gov't. Exh. 13) Kennison's firearm was then returned to him and he was allowed to go home to South Carolina (Pet. App. 45a-46). According to Kennison, his supervision during probation consisted of "occasionally reporting that he had not been

---

[13] Along these same lines, Congress imposed disabilities upon anyone convicted of a crime "punishable" by more than one year's imprisonment, regardless of the sentence actually imposed.

[14] However, Kennison had prior arrests for "assault and battery of a high and aggravated nature" and for "child abuse" (Gov't. Exh. 13).

arrested" (C.A. App. A71).[15] "One year later he notified the Iowa court that he had successfully completed his probation" (Pet. App. 46a) and his record was automatically expunged pursuant to Iowa Code § 789A.6 (1975). Apparently no further findings were made at that time (see Gov't. Exh. 13). Shortly thereafter, respondent, a corporation controlled by Kennison, applied for licenses to engage in firearms-related businesses. Kennison has never applied to the Secretary of the Treasury for relief from federal firearms disabilities, and if his crime were found to be one involving the actual use of a firearm he would be ineligible for such relief (18 U.S.C. 925(c)).

In short, Kennison is precisely the sort of person Congress intended to disable from carrying or dealing in firearms. He was convicted of a serious firearms offense; he may be ineligible to apply to the Secretary of the Treasury for relief from his firearms disabilities; and the circumstances surrounding the expunction of his conviction provide little, if any, assurance that he is a person who can be trusted with a dangerous weapon. Permitting a company controlled by someone like Kennison to engage in the firearms business would contravene the clear purpose of the Gun Control Act.

D. A Rule That Gives Effect To Expunctions Under Widely Varying And Frequently Ambiguous State Laws Would Seriously Hamper Effective Enforcement Of The Act

If, contrary to our view, effect must be given to state expunctions, it would still be necessary to determine what effect those expunctions were intended to have. In this case, the court of appeals masked the difficulties that such determinations would pose by labeling expunction under the Iowa statute "unconditional and absolute" (Pet.

[15] "C.A. App." refers to the appendix in the court of appeals.

App. 10a). The court did not explain or elaborate upon its characterization, and as we will show (see pages 37-39, *infra*) that characterization is plainly incorrect. Moreover, because the court made no effort to distinguish conflicting decisions concerning expunctions under state laws that differ substantially from Iowa's (see Pet. App. 7a-8a), the court seemed to suggest that differences among state statutes are immaterial and that most, if not all, have the same effects as Iowa's. That implication, too, is clearly in error.

1. More than half the states have enacted one or more [16] laws that may be broadly classified as expunction statutes, [17] *i.e.*, statutes that attempt to conceal prior

---

[16] California, for example, has at least eight. Cal. Penal Code §§ 1203.4, 1203.4a, 1203.45 (West Supp. 1982); Cal. Welf. & Inst. Code §§ 781, 1179, 1772, 3200 (West Cum. Supp. 1982); Cal. Health & Safety Code §§ 11357-11361.7 (West Cum. Supp. 1982).

[17] See Alaska Stat. § 12.55.085 (1980); Ariz. Rev. Stat. Ann. § 13-907 (1978); Ark. Stat. Ann. § 43-2344 (Repl. 1977); Cal. Penal Code § 1203.4 (West Supp. 1982); Colo. Rev. Stat. § 16-7-401 (Repl. 1978 & Cum. Supp. 1981); Fla. Stat. Ann. § 948.01 (West 1973 & Cum. Supp. 1982); Idaho Code § 19-2604(1)(1979); Ill. Ann. Stat. ch. 38, § 206-5; ch. 56 1/2, § 1405 (Smith-Hurd Cum. Supp. 1981); Ind. Code Ann. §§ 35-4-8-1, 35-4-8-3.6 (Burns Cum. Supp. 1981); Iowa Code Ann. §§ 907.3-907.9 (West 1979 & Cum. Supp. 1981); Kan. Stat. Ann. § 21-4619 (1981); Md. Ann. Code art. 27, § 737 (Repl. 1976 & Cum. Supp. 1981); Mass. Ann. Laws ch. 276, § 100A (Law. Co-op. 1980 & Cum. Supp. 1982); Mich. Stat. Ann. § 28.1274 (102) (Rev. 1978); Minn. Stat. Ann. §§ 242.31, 638.02(2) (West Cum. Supp. 1982); Nev. Rev. Stat. §§ 179.225, 179.245, 179.255, 179.285 (1979 & 1981); N.H. Rev. Stat. Ann. § 651:5 (1974 & Cum. Supp. 1981); N.J. Stat. Ann. §§ 2C:52-1 to 2C:52-32 (West Supp. 1981); N.Y. Crim. Proc. Law § 720.35 (McKinney 1971 & Cum. Supp. 1981); N.D. Cent. Code §§ 12-53-18, 12-53-19 (Repl. 1976); Ohio Rev. Code Ann. §§ 2953.32—2953.33 (Page Repl. 1975 & Supp. 1981); Okla. Stat. Ann. tit. 22, § 991c (West Cum. Supp. 1981); Tex. Code Crim. Proc. Ann. art. 42.12(7), 42.13(7) (Vernon 1979 & Cum. Supp. 1981); Utah Code Ann. § 77-18-2 (1977); Va. Code § 19.2-392.1-4 (Repl. 1973); Wash. Rev. Code Ann. § 9.95.240 (West 1977 & Cum. Supp. 1982).

convictions or to remove some of the convictions' collateral or residual effects.[18] The various statutes differ, however, in almost every particular. While some are applicable only to young offenders,[19] others may be invoked by adults.[20] Some are available only to persons convicted of certain offenses,[21] but others permit the expunction of a conviction for any crime, including murder.[22] Some are confined to first offenders,[23] but others permit relief to recidivists.[24] Some apply only to persons given certain sentences or sentenced under certain laws,[25] while others

---

[18] For other definitions, see Gough, *The Expungement of Adjudication Records of Juvenile and Adult Offenders: A Problem of Status*, 1966 Wash. U.L.Q. 147, 149; Comment, *Expungement of Criminal Convictions Under the Youth Corrections Act: The Need for Revision*, 66 Ky. L.J. 741 & n.2 (1978); Comment, *Expungement in California: Legislative Neglect and Judicial Misuse of the Statutory Mitigation of Felony Convictions*, 12 U.S.F.L. Rev. 155, 157 (1978). Because of the great variety in the statutes, a more precise definition is not possible. Expunction differs from a pardon or grant of amnesty in that the latter are "exceptional and specific acts of grace, usually granted by executive power, rather than processes of regular and widespread application available through legislative provision." Gough, *supra*, at 150.

[19] See, *e.g.*, Mich. Stat. Ann. § 28.1274(101) (Rev. 1978); N.Y. Crim. Proc. Law § 720.35 (McKinney 1971 & Cum. Supp. 1981).

[20] See, *e.g.*, Ark. Stat. Ann. § 43-2344 (Repl. 1977); Colo. Rev. Stat. § 16-7-401 (Repl. 1978 & Cum. Supp. 1981).

[21] See, *e.g.*, Iowa Code Ann. § 907.3 (West 1979 & Cum. Supp. 1981); N.J. Stat. Ann. § 2C:52-1(b) (West Supp. 1981).

[22] See, *e.g.*, Mass. Ann. Laws ch. 276, § 100A (Law. Co-op. 1980 & Cum. Supp. 1982); Nev. Rev. Stat. § 179.245 (1979).

[23] See, *e.g.*, Md. Ann. Code art. 27, § 737 (Repl. 1976 & Cum. Supp. 1981); Okla. Stat. Ann. tit. 22, § 991c (West Cum. Supp. 1981).

[24] See, *e.g.*, N.J. Stat. Ann. § 2C:52-2(a) (West Supp. 1981).

[25] See, *e.g.*, Colo. Rev. Stat. § 16-7-401 (Repl. 1978 & Cum. Supp. 1981) (deferred judgment and sentence); N.D. Cent. Code § 12-53-18 (Repl. 1976) (probation).

contain no such restriction.[26] Some but not all require a waiting period following conviction.[27] Some are discretionary,[28] while others provide for automatic expunction under certain circumstances.[29] Most of the laws that provide discretionary relief do not specify the grounds for granting relief or the factors to be considered,[30] and some do so only in very general terms.[31] Some of the statutes authorize the courts to grant expunction,[32] while others confer that power upon other authorities.[33]

---

[26] See, *e.g.*, Mass. Ann. Laws ch. 276, § 100A (Law. Co-op. 1980 & Cum. Supp. 1982); N.J. Stat. Ann. § 2C:52-2(a) (West Supp. 1981).

[27] See, *e.g.*, Md. Ann. Code art. 27, § 737 (Repl. 1976 & Cum. Supp. 1981) (waiting period); Nev. Rev. Stat. § 179.245(1) (1979) (waiting period); Ariz. Rev. Stat. Ann. § 13-907 (1978) (no waiting period).

[28] See, *e.g.*, Minn. Stat. Ann. § 638.02(2) (West Cum. Supp. 1982); Wash. Rev. Code Ann. § 9.95.240 (West 1977 & Cum. Supp. 1982).

[29] See, *e.g.*, Ariz. Rev. Stat. Ann. § 13-912 (1978); Colo. Rev. Stat. § 16-7-403(2) (Repl. 1978 & Cum. Supp. 1981).

[30] See, *e.g.*, Nev. Rev. Stat. § 179.245(3) (1979) (court "may" order); N.D. Cent. Code § 12-53-18 (Repl. 1976) (court "may" order); Tex. Code Crim. Proc. Ann. art. 42.12(7) (Vernon 1979 & Cum. Supp. 1981) (court "may" order).

[31] See, *e.g.*, Cal. Penal Code § 1203.4(a) (West Supp. 1982) (where "court, in its discretion and the interests of justice, determines that a defendant should be granted the relief"); Kan. Stat. Ann. § 21-4619(d)(2), (3) (1981) (where "circumstances and behavior of the petitioner warrant" and "consistent with the public welfare"); Ohio Rev. Code Ann. § 2953.32(C) (Page Repl. 1975 & Supp. 1981) (where rehabilitation attained and "consistent with public interest"); Minn. Stat. Ann. § 638.02 (West Cum. Supp. 1982) (where defendant has "good character and reputation").

[32] See, *e.g.*, Ariz. Rev. Stat. Ann. § 13-907 (1978); N.H. Rev. Stat. Ann. § 651:5 (1974 & Cum. Supp. 1981).

[33] See, *e.g.*, Ark. Stat. Ann. § 43-2344 (Repl. 1977) (Commissioner of Correction); Mass. Ann. Laws ch. 276, § 100A (Law. Co-op. 1980 & Cum. Supp. 1982) (Commissioner of Probation); Minn. Stat. Ann. 638.02(2) (West Cum. Supp. 1982) (Board of Pardons).

The statutes also vary widely in the language employed to describe what they are supposed to do. Various statutes are said to "expunge" the conviction, guilty verdict, or guilty plea;[34] "seal" the file or record;[35] "limit access" to the convicted person's "criminal history";[36] discharge the defendant without a judgment of guilt;[37] nullify the conviction;[38] set aside the verdict or conviction;[39] cause the dismissal of the charges;[40] grant a "pardon extraordinary";[41] purge the conviction;[42] and annul the record of conviction.[43]

More important than these differences in terminology are the differences in the statutes' actual effects. Some statutes contain broad general language that an expunged conviction is "deemed not to have occurred,"[44] but some of these same laws contain express provisions significantly limiting the effect of expunction.[45] Moreover, it

---

[34] See, *e.g.*, Okla. Stat. Ann. tit. 22, § 991c (West Cum. Supp. 1981); N.J. Stat. Ann. §§ 2C:52-1 to 2C:52-32 (West Supp. 1981).

[35] Mass. Ann. Laws ch. 276, § 100A (Law. Co-op. 1980 & Cum. Supp. 1982); Nev. Rev. Stat. § 179.245(3) (1979).

[36] Ind. Code. Ann. § 35-4-3.6 (Burns Cum. Supp. 1981).

[37] Okla. Stat. Ann. tit. 22, § 991c (West Cum. Supp. 1981).

[38] Minn. Stat. Ann. 638.02(2) (West Cum. Supp. 1982).

[39] See, *e.g.*, Alaska Stat. § 12.55.085 (1980); Mich. Stat. Ann. § 28.1274(101) (Rev. 1978).

[40] See, *e.g.*, Tex. Code Crim. Proc. Ann. art. 42.12(7) (Vernon 1979); Wash. Rev. Code Ann. § 9.95.240 (West 1977 & Cum. Supp. 1982).

[41] Minn. Stat. Ann. 638.02(2) (West Cum. Supp. 1982).

[42] Minn. Stat Ann. 638.02(2) (West Cum. Supp. 1982).

[43] N.H. Rev. Stat. Ann. § 651:5 (1974 & Cum. Supp. 1981).

[44] See, *e.g.*, Ohio Rev. Code Ann. § 2953.32(C) (Page Repl. 1975 & Supp. 1981); Nev. Rev. Stat. 179.285 (1981).

[45] See, *e.g.*, Ohio Rev. Code Ann. §§ 2953.32(E) (may be proved in later prosecution), 2953.33 (may be considered in sentencing),

is not apparent that any state actually seeks to expunge the fact of conviction in the literal sense. And while a conviction may have innumerable legal and practical consequences, [46] few if any of the statutes attempt to specify the effects of expunction in a comprehensive manner. Thus, only a minority of the statutes address the following questions: whether the expunged conviction may be considered in sentencing for a subsequent offense, [47] in setting bail on subsequent charges, or in parole proceedings; [48] whether the expunged conviction may be used to impeach testimony; [49] what is to be done with the records pertaining to the conviction; [50] whether any effort is to be made to retrieve records previously furnished to other jurisdictions; [51] and whether, and if so under what circumstances, the convicted person may deny the fact of conviction. [52] Finally, only a minority of the statutes specify whether an expunged conviction may be proved to establish an element of an offense charged in subsequent proceedings. [53]

2953.32(D) (Page Repl. 1975 & Supp. 1981) (access to record by law enforcement officers for certain purposes).

[46] See generally Special Report, *The Collateral Consequences of a Criminal Conviction*, 23 Vand. L. Rev. 929 (1970).

[47] See, *e.g.*, Kan. Stat. Ann. § 21-4619 (1981); Tex. Code Crim. Proc. Ann. art. 42.12(7) (Vernon 1979).

[48] N.J. Stat. Ann. §§ 2C:52-21, 2C:52-22 (West Supp. 1981).

[49] See, *e.g.*, Ark. Stat. Ann. § 43-2344 (Repl. 1977); Nev. Rev. Stat. 179.285 (1981).

[50] See, *e.g.*, Ind. Code Ann. § 35-4-8-3.6 (Burns Cum. Supp. 1981) (destroy or deliver to individual); Mass. Ann. Laws ch. 276, § 100A (Law. Co-op. 1980 & Cum. Supp. 1982) (seal); N.J. Stat. Ann. 2C:52-1(a) (West Supp. 1981) (extract and isolate).

[51] Nev. Rev. Stat. § 179.255(3) (1979).

[52] See, *e.g.*, Ark. Stat. Ann. § 43-2344 (Repl. 1977); Ohio Rev. Code Ann. § 2953.32(B) (Page Repl. 1975 & Supp. 1981).

[53] See pages 35-37, *infra*.

2. There are some state expunction laws that were clearly not meant to remove firearms disabilities resulting from conviction. For example, the California statute (Cal. Penal Code § 1203.4(a) (West Supp. 1982)), which permits a felon to be "released from all penalties and disabilities resulting from the offense of which he has been convicted," expressly adds that "[d]ismissal of an accusation or information pursuant to this section does not permit a person to own, possess or have in his custody or control any firearms capable of being concealed upon the person or prevent his conviction under [Cal. Penal Code § 12021]," which prohibits such activities by convicted felons. See *United States* v. *Andrino*, 497 F.2d 1103, 1106-1107 (9th Cir. 1974) (expunction under this provision does not eliminate federal firearms disabilities). The provision specifying the effect of expunction with respect to firearms disabilities was added to overrule the California Supreme Court's prior interpretation of the expunction statute in *People* v. *Taylor*, 178 Cal. App. 2d 472, 3 Cal. Rptr. 186 (1960). See *United States* v. *Andrino*, *supra*, 497 F.2d at 1107. See also Kan. Stat. Ann § 21-4619(g)(1981).

The California statute goes further and provides that "in *any* subsequent prosecution of the defendant for any other offense, the prior conviction may be pleaded and proved and shall have the same effect as if [expunction had not been ordered]" (emphasis added) (Cal. Penal Code § 1203.4 (West Supp. 1982)). In similar terms, Ariz. Rev. Stat. § 13-907 (1978) provides that a defendant may be "released from all penalties and disabilities resulting from the conviction * * * *except that the conviction may be pleaded and proved in any subsequent prosecution of such person by the state or any of its subdivisions for any offense * * * as if the judgment of guilt had not been set aside*" (emphasis added). See *United States* v. *Herrell*,

588 F.2d 711 (9th Cir. 1978) (Arizona expunction does not remove federal firearms disabilities). Wash. Rev. Code Ann. § 9.95.240 (West 1977 & Cum. Supp. 1982) contains a virtually identical provision. See *United States* v. *Potts*, 528 F.2d 883 (9th Cir. 1975) (en banc) (Washington expunction does not remove federal firearms disabilities). The Washington statute also illustrates the problems federal courts would face if required to give effect to state expunction statutes, for while the statute seems clearly to permit the expunged conviction to be "pleaded and proved" in a subsequent prosecution, the state attorney general interpreted it as removing state firearms disabilities. Op. Att'y. Gen. No. 5 (1969). That construction was initially followed but later rejected by the Ninth Circuit. See *United States* v. *Potts*, *supra*, overruling, *United States* v. *Hoctor*, 487 F.2d 270 (9th Cir. 1973).

Minnesota law, seeming to give with one hand what it takes away with the other, provides that a "discharge" under Minn. Stat. Ann. § 242.31(2) (West Cum. Supp. 1982) "restore[s] the defendant to his civil rights and purge[s] and free[s] the defendant from all penalties and disabilities arising from his conviction and it shall not thereafter be used against him, *except in a criminal prosecution for a subsequent offense if otherwise admissible therein*" (emphasis added). See *United States* v. *Kelly*, 519 F.2d 794 (8th Cir. 1975) (Minnesota expunction does not remove federal firearms disabilities). See also, *e.g.*, Kan. Stat. Ann. § 21-4619(e)(4) (1981); N.D. Cent. Code 12-53-19 (Repl. 1976); Ohio Rev. Code Ann. § 2953.32 (Page Repl. 1975 & Supp. 1981).

3. While it is apparent that expunctions under statutes such as those discussed above were not meant to remove firearms disabilities, other statutes, such as Iowa's, are less clear. The court of appeals termed expunction under Iowa law "unconditional and absolute"

(Pet. App. 10a), but it is obvious from the face of the statute that the court's description is not accurate.

At the time of Kennison's conviction and the subsequent expunction order, as well as at present, Iowa courts were authorized in certain cases to "defer judgment" following a guilty plea or verdict and to "place the defendant on probation." Iowa Code § 789A.1(1) (1975). See also Iowa Code Ann. § 907.3 (West 1979 & Cum. Supp. 1981). Upon the defendant's discharge from probation, "the court's criminal record with reference to the deferred judgment" was "expunged." Iowa Code § 789A.6 (1975). See also Iowa Code Ann. § 907.9 (West 1979 & Cum. Supp. 1981). However, a separate record was maintained by the supreme court administrator. Iowa Code § 789A.1 (1975). See also Iowa Code Ann. §§ 907.4, 907.9 (West 1979 & Cum. Supp. 1981). That record was used to keep track of the date and number of prior expunged convictions, because state law limited the availability of such relief. Iowa Code § 789A.1*(g)*, *(h)* (1975). See also Iowa Code Ann. § 907.3(1)*(c)*, *(d)* (West 1979 & Cum. Supp. 1981). In addition, under present law, all "criminal history data" may be released to "criminal justice agencies." Iowa Code Ann. §§ 692.1(5) and 692.2 (West 1979 & Cum. Supp. 1981). The Bureau of Alcohol, Tobacco and Firearms learned of Kennison's expunged conviction in this case by requesting that information from the Iowa courts. See Gov't. Exh. 13. In short, the record of a conviction expunged under Iowa law is apparently not expunged completely.

More important is the fact, ignored by the court of appeals, that expunction of a criminal record and restoration of citizenship rights are apparently two different things under Iowa law. When Kennison's conviction was expunged, Iowa Code § 789A.6 (1975) provided that upon completion of a period of probation imposed in connection

with a deferred judgment, "the court shall forward to the governor a recommendation for or against restoration of citizenship rights to such person." See also Iowa Code Ann. § 907.9 (West 1979 & Cum. Supp. 1981). We fail to understand how an expunction that does not automatically restore citizenship rights may be labelled "unconditional and absolute." Furthermore, where state citizenship rights are withheld despite expunction, it would seem at least doubtful that Congress intended federal firearms disabilities to be removed.

Decisions of the Iowa courts do not elucidate the effect of an Iowa expunction for present purposes. While the Supreme Court of Iowa has held that an expunged conviction does not justify suspension of a liquor license under state statutes authorizing suspensions based upon convictions (*Iowa Beer & Liquor Control Department* v. *McBlain*, 263 N.W. 2d 226 (1977)), the same court has subsequently held (*State* v. *Hall*, 301 N.W. 2d 729 (1981)) that a defendant restored by the governor to " 'all the rights, privileges and immunities which were forfeited by reason of [his] conviction' " (*id.* at 732) is nevertheless a person who "is convicted" of a felony under the state gun control law (Iowa Code Ann. § 724.26 (West 1979 & Cum. Supp. 1981).

4. Other state statutes may go further than Iowa's. See, *e.g.*, Ill. Rev. Stat. ch. 56½, § 1402 (expunged proceeding "not a conviction * * * for purposes of disqualification or disabilities imposed by law upon conviction of a crime"). But see *United States* v. *Benson*, 605 F.2d 1093 (9th Cir. 1979) (expunction under Illinois statute does not remove federal firearms disabilities). And, as previously noted, some appear less far-reaching. Under the decision below, which relies on the "unconditional and absolute" nature of the Iowa expunction statute (see Pet. App. 10a), it would be necessary for the

federal courts to decide on a state-by-state basis whether expunction was intended to remove federal firearms disabilities. Frequently, as in the case of Iowa law, neither the statute nor state court decisions would provide clear guidance.

Even more perplexing problems would confront those required to enforce the Gun Control Act and those bound by its provisions. Without a definitive federal court decision concerning the state law in question, the Secretary of the Treasury would not know whether an applicant with an expunged state conviction was eligible for a license. See 18 U.S.C. (& Supp IV) 923(d)(1)(B). Similarly, law enforcement agents and prosecutors would not know whether a person with such a conviction committed a federal crime by shipping, transporting, or receiving firearms (see 18 U.S.C. 922(g)(1) and (h)(1)) or by statements made in connection with the acquisition of firearms (see 18 U.S.C. 922(a)(6)). Firearms dealers, the "principal agent[s] of federal enforcement" (*Huddleston* v. *United States, supra*, 415 U.S. at 824), would not know whether they could sell or dispose of firearms to such persons without incurring criminal penalties (see 18 U.S.C. 922(d)(1)). Finally, persons with expunged state convictions would be uncertain of their status and, if some state expunctions were held to remove federal firearm disabilities, some persons might be lulled into the false belief that all state expunctions had that effect. [54]

[54] Under the uniform rule we advocate, persons with expunged convictions are much less likely to be misled. Furthermore, the chances of misleading persons with expunged state convictions would be greatly reduced if, as has been recommended, state authorities warned those persons that expunction does not remove federal disabilities. See *United States* v. *Kelly*, 519 F.2d 794, 796 (8th Cir. 1975); *United States* v. *Potts*, 528 F.2d 883, 886 (9th Cir. 1975) (Wright, J., concurring).

This confusion undoubtedly would hamper enforcement of the Gun Control Act[55] and is contrary to Congress' plain intent. As noted above, the Gun Control Act "is a carefully constructed package of gun control legislation," (*Scarborough* v. *United States*, *supra*, 431 U.S. at 570) and in framing its terms Congress took pains to avoid the very sort of problems that the decision below will inevitably create. The provisions of the Act demonstrate that Congress endeavored to prevent any uncertainty concerning those persons subject to disabilities by virtue of prior convictions. Congress used unambiguous language in attaching gun control disabilities to "any person * * * who has been convicted" of a qualifying offense (18 U.S.C. 922(g)(1) and (h)(1)). Then, rather than enumerating potentially confusing exceptions, Congress provided that relief could be granted in certain cases by the Secretary of the Treasury but that "[w]henever the Secretary grants relief to any person pursuant to this section he shall promptly publish in the Federal Register notice of such action, together with the reasons therefor." 18 U.S.C. 925(c). The decision below leaves a gaping hole in Congress' "carefully constructed" plan of enforcement.[56]

[55] A decision adopting the court of appeals' analysis might also have an adverse impact upon the enforcement of other important federal statutes. For example, 8 U.S.C. 1251(a)(4) and (11) provide for the deportation of any alien who "has been convicted" of certain crimes, and expunction of the conviction has been held immaterial in that context. See, *e.g.*, *Ocon-Perez* v. *INS*, 550 F.2d 1153, 1154 (9th Cir. 1977); *Kolios* v. *INS*, 532 F.2d 786 (1st Cir.), cert. denied, 429 U.S. 884 (1976); *Gutierrez-Rubio* v. *INS*, 453 F.2d 1243, 1244 (5th Cir. 1972). In addition, as noted above (see page 23, *supra*), there are provisions of law governing the sale and possession of explosives that are almost identical to those involved here. 18 U.S.C. 842(i); 18 U.S.C. 845(b).

[56] The court of appeals' decision is not supported by 18 U.S.C. 927, which provides that Title IV is not intended "to occupy the field * * *

5. We have noted the wide diversity in state expunction statutes and the uncertainty concerning the precise effects many were intended to produce. But even if a state statute provided that an expunged conviction was to have no continuing effect whatsoever, it would not necessarily follow that expunction under that provision was meant to remove disabilities imposed by federal firearms laws. In such a case, the state legislature might well have been concerned solely with the effect of the conviction under state law. The legislature might not have regarded disabilities imposed by federal law as any of its proper concern. Or, as seems likely, the legislature might simply not have given any thought to a matter that did not fall within its own sphere of responsibility. Thus, the court of appeals' decision in this case makes application of the Gun Control Act turn upon a question to which, in many cases, there may simply be no answer.

---

to the exclusion of the law of any State on the same subject matter, unless there is a direct and positive conflict" between state and federal law. Section 927 merely makes it clear that state firearms laws are not preempted. See *Thrall* v. *Wolfe*, *supra*, 503 F.2d at 317.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

REX E. LEE
Solicitor General

J. PAUL MCGRATH
Assistant Attorney General

KENNETH S. GELLER
Deputy Solicitor General

SAMUEL A. ALITO, JR.
Assistant to the Solicitor General

WILLIAM KANTER
DOUGLAS LETTER
Attorneys

JUNE 1982

APPENDIX

18 U.S.C. 922(g) provides:

> (g) It shall be unlawful for any person—
>
> (1) who is under indictment for, or who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;
>
> (2) who is a fugitive from justice;
>
> (3) who is an unlawful user of or addicted to marihuana or any depressant or stimulant drug (as defined in section 201(v) of the Federal Food, Drug, and Cosmetic Act) or narcotic drug (as defined in section 4731(a) of the Internal Revenue Code of 1954); or
>
> (4) who has been adjudicated as a mental defective or who has been committed to a mental institution;
>
> to ship or transport any firearm or ammunition in interstate or foreign commerce.

18 U.S.C. 922(h) provides:

> (h) It shall be unlawful for any person—
>
> (1) who is under indictment for, or who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;
>
> (2) who is a fugitive from justice;
>
> (3) who is an unlawful user of or addicted to marihuana or any depressant or stimulant drug (as defined in section 201(v) of the Federal Food, Drug, and Cosmetic Act) or narcotic drug (as defined in section 4731(a) of the Internal Revenue Code of 1954); or
>
> (4) who has been adjudicated as a mental defective or who has been committed to any mental institution;
>
> to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

18 U.S.C. 923 provides in pertinent part:

> (a) No person shall engage in business as a firearms or ammunition importer, manufacturer, or dealer until he has filed an application with, and received a license to do so

from, the Secretary. The application shall be in such form and contain such information as the Secretary shall by regulation prescribe. * * *

(b) Any person desiring to be licensed as a collector shall file an application for such license with the Secretary. The application shall be in such form and contain such information as the Secretary shall by regulation prescribe. * * *

(c) Upon the filing of a proper application and payment of the prescribed fee, the Secretary shall issue to a qualified applicant the appropriate license which, subject to the provisions of this chapter and other applicable provisions of law, shall entitle the licensee to transport, ship, and receive firearms and ammunition covered by such license in interstate or foreign commerce during the period stated in the license.

(d) (1) Any application submitted under subsection (a) or (b) of this section shall be approved if—

(A) the applicant is twenty-one years of age or over;

(B) the applicant (including, in the case of a corporation, partnership, or association, any individual possessing, directly or indirectly, the power to direct or cause the direction of the management and policies of the corporation, parntership, or association) is not prohibited from transporting, shipping, or receiving firearms or ammunition in interstate or foreign commerce under section 922(g) and (h) of this chapter;

(C) the applicant has not willfully violated any of the provisions of this chapter or regulations issued thereunder;

(D) the applicant has not willfully failed to disclose any material information required, or has not made any false statement as to any material fact, in connection with his application; and

(E) the applicant has in a State (i) premises from which he conducts business subject to license under this chapter or from which he intends to conduct such business within a reasonable period of time, or (ii) in the case of a collector, premises from which he conducts his collecting subject to license under this chapter or from

which he intends to conduct such collecting within a reasonable period of time.

18 U.S.C. 925(c) provides:

> (c) A person who has been convicted of a crime punishable by imprisonment for a term exceeding one year (other than a crime involving the use of a firearm or other weapon or a violation of this chapter or of the National Firearms Act) may make application to the Secretary for relief from the disabilities imposed by Federal laws with respect to the acquisition, receipt, transfer, shipment, or possession of firearms and incurred by reason of such conviction, and the Secretary may grant such relief if it is established to his satisfaction that the circumstances regarding the conviction, and the applicant's record and reputation, are such that the applicant will not be likely to act in a manner dangerous to public safety and that the granting of the relief would not be contrary to the public interest. A licensed importer, licensed manufacturer, licensed dealer, or licensed collector conducting operations under this chapter, who makes application for relief from the disabilities incurred under this chapter by reason of such a conviction, shall not be barred by such conviction from further operations under his license pending final action on an application for relief filed pursuant to this section. Whenever the Secretary grants relief to any person pursuant to this section he shall promptly publish in the Federal Register notice of such action, together with the reasons therefor.

Iowa Code § 789A.1 (1975) (current version at Iowa Code Ann. § 907.9 (West 1979 & Cum. Supp. 1981)) provided:

> **789A.1 Deferred judgment or suspended sentence—probation.** The trial court may, upon a plea of guilty, verdict of guilty, or a special verdict upon which a judgment of conviction may be rendered, exercise either of the options contained in subsections 1 and 2. However, this section shall not apply to the crimes of treason, murder, or violation of section 204.401, subsection 1 or 2, to which section 204.409, subsection 2 is not applicable and which is not proved to be an accommodation offense under section 204.410.

1. With the consent of the defendant, the court may defer judgment and place the defendant on probation upon such terms and conditions as it may require. Upon fulfillment of the terms of probation the defendant shall be discharged without entry of judgment. Upon violation of the terms, the court may enter an adjudication of guilt and proceed as otherwise provided.

However, this subsection shall not be available if any of the following is true:

a. The defendant attempted to kill anyone during the commission of the offense.

b. The defendant purposefully inflicted or attempted to inflict a serious injury upon anyone during the commission of the offense. "Serious injury" means death, permanent disability or disfigurement, protracted loss or impairment of the function of any body member or organ, an injury requiring extended treatment or a prolonged healing period, a disabling mental illness requiring extended treatment or prolonged care, or an injury which at the time of deferment of judgment appears likely to result in any of the foregoing.

c. The defendant used, threatened to use or displayed in a threatening manner a dangerous weapon during the commission of the offense. "Dangerous weapon" means any instrument or device designed primarily for use in inflicting death or injury upon a human being or other living creature, and which is capable of inflicting death upon a human being when used in the manner for which it was designed. "Dangerous weapon" also includes any instrument or device of any sort whatsoever which is actually used in such a manner as to indicate that the defendant intends to inflict death or serious injury upon anyone and which, when so used, is capable of inflicting death upon a human being.

d. The defendant kidnaped any person for ransom during the commission of the offense.

e. During the commission of the offense the defendant committed rape or sodomy by force or threat of force, committed assault with intent to commit rape by force or threat of force, committed or attempted to commit rape of or sodomy with a child twelve years of age or under, or

committed a violation of section 725.2 with respect to a child twelve years of age or under and which included any of the following: Force or threat of force, fondling or touching the child in a lewd manner, or soliciting a sexual act with the child.

f. The defendant has been previously convicted of a felony. "Felony" means a conviction in a court of this or any other state or of the United States, of an offense classified as a felony by the law under which he was convicted at the time of his conviction.

g. Prior to the commission of the offense the defendant had been granted a deferred judgment or similar relief, two or more times anywhere in the United States.

h. Prior to the commission of the offense the defendant had been granted a deferred judgment or similar relief in a felony prosecution anywhere in the United States within the preceding five years, measured from the date of granting of deferment of judgment to the date of commission of the offense.

Any deferment of judgment under this subsection shall be promptly reported to the supreme court administrator who shall maintain a permanent record thereof including the name of the defendant, the district court docket number, the nature of the offense, and the date of the deferment. Before granting deferment in any case, the court shall request of the supreme court administrator a search of the deferred judgment docket and shall consider any prior record of a deferment of judgment against the defendant. The permanent record provided for in this subsection shall constitute a confidential record exempted from public access under section 68A.7 and shall be available only to justices of the supreme court, district judges, district associate judges, and judicial magistrates requesting information pursuant to this subsection.

2. By record entry at time of or after sentencing, the court may suspend the sentence and place the defendant on probation upon such terms and conditions as it may require.

Before exercising either of the options contained in subsections 1 and 2, the court shall first determine which of them will provide maximum opportunity for the rehabil-

itation of the defendant and protection of the community from further offenses by the defendant and others. In making this determination the court shall consider the age of the defendant, his prior record of convictions, if any, his employment circumstances, his family circumstances, the nature of the offense committed, whether a dangerous weapon or force was used in the commission of such offense, and such other factors as shall be appropriate. The court shall file a specific written statement of its reasons for and the facts supporting its decision to defer judgment or to suspend sentence and its decision on the length of probation.

Iowa Code § 789A.6 (1975) (current version at Iowa Code Ann. § 907.9 (West 1979 & Cum. Supp. 1981)) provided:

789A.6 Discharge from probation. At any time that the court determines that the purposes of probation have been fulfilled, the court may order the discharge of any person from probation. At the expiration of the period of probation, in cases where the court fixes the term of probation, the court shall order the discharge of such person from probation, and the court shall forward to the governor a recommendation for or against restoration of citizenship rights to such person. A person who has been discharged from probation shall no longer be held to answer for his offense. Upon discharge from probation, if judgment has been deferred under section 789A.1, the court's criminal record with reference to the deferred judgment shall be expunged. The record maintained by the supreme court administrator required by section 789A.1 shall not be expunged. The court's record shall never be expunged in any other circumstances except as provided in section 602.15.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1982 376294 1009

Respondent's Brief

Supreme Court, U.S.
FILED
SEP 8 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1180

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

G. R. DICKERSON, DIRECTOR, BUREAU OF ALCOHOL, TOBACCO AND FIREARMS, PETITIONER

v.

NEW BANNER INSTITUTE, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT

JACK F. McGUINN
LEWIS C. LANIER
Attorneys

1610 Bull Street
Columbia, S. C. 29201
(803) 256-0600

TABLE OF CONTENTS

Page

Constitutional provisions 1

Statement 2

Summary of argument 12

Argument:

I. The disabilities imposed by the Gun Control Act upon any person who "has been convicted" of certain crimes do not apply to a person whose conviction has been expunged; or, at least, do not apply to a person after the charge against him has been dismissed and he has been discharged without entry of judgment. 21

A. The Expungement Problem 22

B. The Full Faith and Credit Problem .. 31

C. "Convicted of" v. "Charged with" ... 41

D. Other Laws 44

II. The Gun Control Act is local option on its face and thus capable of only geographic application; it prescribes prohibited amercements; it unlawfully restricts personal liberty; it is a bill of attainder; and it is therefore unconstitutional. 47

A. The Local Option 47

B. The Amercement Problem 57

C. The Personal Liberty Question 63

D. The Bill of Attainder Problem 65

III. No justiciable controversy is present. The only controversy raised by proper

Contents — Continued Page

notification, pursuant to 18 U.S.C. 923 (f)(1), had already been resolved when Petitioner affirmed the Administrative Law Judge's decision. 65

A. The Due Process Problem 66

B. Shifting the Burden of Proof 75

Conclusion 87

Appendix 1a

TABLE OF AUTHORITIES

Cases: Page

ACMR, 2 M.J. 987, aff'd, 3 M.J. 101 . . 54
Allen v. *McCurry*, 449 U.S. 90, 96, 101 S.Ct. 411, 416, 66 L.Ed.2d 308 . . . 35
Andrews v. *Police Court of City of Stockton*, 123 P.2d 128, 129 27
Angel v. *Billington*, 330 U.S. 183, 67 S.Ct. 657, 91 L.Ed. 832 35
Association of Surrogate's and Supreme Court Reporters v. *Evans*, 424 N.Y.S. 2d 818, 102 Misc.2d 883 50
Baldwin v. *Iowa State Traveling Men's Assoc.*, 283 U.S. 522, 51 S.Ct. 517, 75 L.Ed. 1244 37
Barker v. *United States*, 579 F.2d 1226. 22, 23
Boykin v. *United States*, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 . . . . 15, 20
Caroll v. *Lanza*, 349 U.S. 408, 75 S.Ct. 804, 99 L.Ed. 1182 33
Chase v. *Pope*, 247 F. Supp. 110 37
Culp v. *United States*, 131 F.2d 93 . . 63
Doe v. *State*, 328 A.2d 784 40
Durfee v. *Duke*, 374 U.S. 106, 84 S.Ct. 242, 11 L.Ed.2d 186 33

Cases—Continued Page

Ferry v. *Ramsey*, 277 U.S. 88, 48 S.Ct. 443, 72 L.Ed. 796 77
Fisher v. *Federal National Mortgage Association*, 360 F. Supp. 207 34
Franklin National Bank v. *Karkow*, 295 F. Supp. 910 36
Hall v. *Hawaiian Pineapple Co.*, 72 F. Supp. 533 64
Hampton v. *McConnell*, 3 Wheat 234, 235, 4 L.Ed. 378 36
Helms v. *Jones*, 621 F.2d 211, probable jurisdiction noted, 101 S.Ct. 737, reversed, 101 S.Ct. 2434 53
Huron Holding Corp. v. *Lincoln Mine Operating Co.*, 312 U.S. 183, 61 S.Ct. 513, 85 L.Ed. 1550 36
In Re J., 37 App. Div. 2d 717, 325 N.Y. S.2d 235 40
Kelly v. *Immigration and Naturalization Service*, 349 F.2d 473, 475 40
Kercheval v. *United States*, 274 U.S. 220 47 S.Ct. 582, 71 L.Ed. 1009 20
Kremer v. *Chemical Construction Corp.* 102 S.Ct. 1883, 1889 34-35
Leary v. *United States*, 395 U.S. 6, 89 S.Ct. 1532 . . . . . 76, 78
Lewis v. *United States*, 445 U.S. 55, 100 S.Ct. 915, 63 L.Ed.2d 198 . . 12-13, 16, 22 39, 90-91, 94
Loper v. *Beto*, 405 U.S. 473, 92 S.Ct. 1014 57
Mobile J. & K.C.R. Co. v. *Turnipseed*, 219 U.S. 35, 31 S.Ct. 136, 55 L.Ed. 78 76
Montana v. *United States*, 440 U.S. 147, 99 S.Ct. 970, 59 L.Ed.2d 210 35
Morrison v. *California*, 291 U.S. 82, 54 S.Ct. 281, 78 L.Ed. 664 76

Cases—Continued Page

New Banner Institute v. *Dickerson*, 649 F.2d 216 12-13
Niemotko v. *State of Maryland*, 349 U.S. 268, 71 S.Ct. 325, 328, 95 L.Ed. 267 . 52
O'Connor v. *Stanley*, 54 F.2d 20 36
Olsen v. *Delmore*, 295 P.2d 324, 48 Wash. 2d 545 49
People v. *Camerlingo*, 131 P. 601, 69 Cal. App. 466 65
People v. *Cannizzarro*, 31 P.2d 1066, 138 Cal. App. 28 50
People v. *Marcy*, 628 P.2d 69 55
People v. *Montoya*, 582 P.2d 673, 196 Colo. 111 56
Pierre v. *State of Louisiana*, 306 U.S. 354, 59 S.Ct. 536, 83 L.Ed. 757 60-65
Posadas v. *National City Bank*, 296 U.S. 497, 503, 56 S.Ct. 349, 352, 80 L.Ed. 351 36
Radzanower v. *Touche Ross & Co.*, 426 U.S. 148, 154, 96 S.Ct. 1989, 1993, 48 L.Ed. 2d 540 35
Richards v. *Townsend*, 303 F. Supp. 793 . 55
Rosehill Cemetary Co. v. *City of Chicago*, 185 N.E. 170, 352 Ill. 11, 87 A.F.R. 742 61
R.R. v. *Dept. of the Army*, 482 F.Supp. 770, 55 A.L.R.Fed 327 41
S. v. *N.Y.*, 32 N.Y.2d 592, 347 N.Y.S.2d 54, 300 N.E. 426 40
Screws v. *United States*, 140 F.2d 662 . . 63
Smith v. *State of Texas*, 311 U.S. 128, 61 S.Ct. 164, 85 L.Ed. 84 61
State v. *Kallas*, 94 P.2d 414, 97 Utah 492 54
State v. *Farmer*, 234 N.W.2d 89 . . . 19-20, 22
State v. *Fowler*, 136 S.E. 709, 193 N.C. 290 51

Cases—Continued Page

State v. *Fulcher*, 243 S.E.2d 338, 294 N.C. 503 51
State v. *Martell*, 591 P.2d 789, 22 Wash. App. 415 57
State v. *Myers*, 638 W.W.2d 892 33
State v. *Richards*, 621 P.2d 165, 27 Wash. App. 703 56
State v. *Thomas*, 69 So.2d 738, 224 La. 431 54
State ex rel. White v. *Board of County Commissioners Wyandotte County*, 39 P.2d 286, 140 Kan. 744 50-51
State of Iowa v. *David Foster Kennison*, In the District Court of Iowa In and For Des Moines County, Criminal Cause No. 7595 17
State of Louisiana ex rel. Francis v. *Resweber*, 329 U.S. 459, 67 S.Ct. 374, 91 L.Ed. 422, rehearing denied, 330 U.S. 853, 67 S.Ct. 673, 91 L.Ed. 1295 . 52
State v. *Wilson*, 397 N.E.2d 1206, 60 Ohio App. 2d 377, aff'd, 388 N.E.2d 745, 58 Ohio St. 52 55
Tembruell v. *City of Seattle*, 392 P.2d 453 20
Thrall v. *Wolfe*, 503 F.2d 313, cert. denied, 420 U.S. 972, 95 S.Ct. 1392, 43 L.Ed.2d 652 . . . . . 4-5, 33
Tot v. *United States*, 319 U.S. 463, 63 S.Ct., 1241, 1245, 1246, 87 L.Ed. 1519 76-82
United States v. *Andrino*, 497 F.2d 1103 1107 43
United States v. *Arrington*, 618 F.2d 1119 22
United States v. *Barrett*, 423 U.S. 212, 65 S.Ct. 498, 46 L.Ed. 450, aff'd, 504 F.2d 629 5

Cases—Continued Page

United States v. *Bass*, 404 U.S. 336, 92 S.Ct. 515, 30 L.Ed.2d 488 . . . . . 3, 39, 43
United States v. *Benson*, 605 F.2d 1093 . 39
United States v. *Bergeman*, 592 F.2d 533, 534 . . . . . .22, 38
United States v. *Brzoticky*, 588 F.2d 775 22
United States v. *Fryer*, 545 F.2d 11, 13 . 22
United States v. *Gainey*, 380 U.S. 63, 85 S.Ct. 754, 13 L.Ed.2d 658 80-82
United States v. *Glasgow*, 414 U.S. 485, cert. denied, 478 F.2d 850 41
United States v. *Hoctor*, 487 F.2d 270 . . 43
United States v. *Kelly*, 519 F.2d 794 . . 43
United States v. *Locke*, 409 F. Supp. 600, aff'd, 542 F.2d 800 20
United States v. *Matassini*, 565 F.2d 1297, 44 A.L.R. Fed. 666 . . . . . 2, 4, 5
United States v. *Mostad*, 485 F.2d 199 . . 43
United States v. *One Lot Eighteen Firearms*, 325 F. Supp. 1326 4
United States v. *Potts*, 528 F.2d 883 . . 20
United States v. *Purgason*, 565 F.2d 1279, 1280 22
United States v. *Romano*, 382 U.S. 136, 86 S.Ct. 754, 15 L.Ed. 210 81-82
United States v. *Shulthsis*, 486 F.2d 1331 56
United States v. *United Continental Tuna Corp.*, 425 U.S. 164, 168, 169, 96 S.Ct. 1319, 1322, 47 L.Ed.2d 653 36
Vaught v. *State of Missouri*, 265 F. Supp. 933 34
West Virginia State Board of Education v. *Barnett, W. Va.*, 319 U.S. 624, 63 S.Ct. 1178, 87 L.Ed. 1628, 147 A.L.R. 674 . . 63
Yacovone v. *Bolger*, 207 U.S. 103, 645 F.2d 1028 33
Yick Wo v. *Hopkins*, 118 U.S. 356, 65 S.Ct. 1064, 30 L.Ed. 220 60

Statutes and regulations: Page

Code of Federal Regulations, 27 U.S.C.
188.73 . . . . . .19, 66, 74

Omnibus Crime Control and Safe Streets Act of 1968, amended by the Gun Control Act of 1968:

Title IV, 18 U.S.C.(& Supp.) 921 *et seq.* 2, 67-68, 74, 83

18 U.S.C. 922 3
18 U.S.C. 922(g) and (h) . . 10-11, 18-19 68, 72, 84, 88-89
18 U.S.C. 922(h) 5-6
18 U.S.C. 922(h)(1) 37, 45
18 U.S.C. 923(d)(1)(B). . 10-11, 16, 18-19 30, 68, 70, 72 75, 83, 87-89
18 U.S.C. 923(d)(1)(D). 89
18 U.S.C. 923(e). 10, 67
18 U.S.C. 923(f). 19, 88
18 U.S.C. 923(f)(1) 67, 71
18 U.S.C. 923(f)(2) 87
18 U.S.C. 924(a). 10
18 U.S.C. 927 . . . . . .37, 44

Title VII, 18 U.S.C. App. 1201 *et seq.*. 2-3

18 U.S.C. 1202. . . . . 3, 72
18 U.S.C. 1202(a)(1). 6
18 U.S.C. 1203. . . . . 5, 6

Other U.S.C. & U.S.C.A. Titles

5 U.S.C. 552(a) 40
21 U.S.C. 844(b). 28
26 U.S.C. 5601(a)(1). 82
26 U.S.C. 5601(a)(4) and (b)(2) 81
28 U.S.C.A. 1738. 34-35

Statutes and regulations—Continued Page

Uniform Firearms Act RCW 9.41.160 49

Iowa Codes:

§ 692.1(5) 9
§ 692.2 9
§ 695.2 7
§ 789.A.1 . . . . . 7, 20
§ 789.A.6 46

Public Local Laws, N.C. 1925, c.114, 82 . 51

S.C. Code:

Criminal Code §16-23-10 *et seq.* 44
Chapter 13-10 *et seq.* 44

United States Constitution:

U.S.C.A. Const. Art. I, §9 65
U.S.C.A. Const. Art. IV, §2 . .26, 60-64, 96-97
U.S.C.A. Const. Amend. V 10, 19, 25-26
43, 66-85
89-90, 92
U.S.C.A. Const. Amend. VIII . 4, 26, 55, 57-63
U.S.C.A. Const. Amend. IX 24, 61, 63-64
U.S.C.A. Const. Amend. X 26, 32-37
39-40, 90-91
U.S.C.A. Const. Amend. XIV, §1 . 4, 10, 17-19
23-26, 43
47-57, 60-85
89-90, 92, 96-97

Miscellaneous:

Annotation, *Expungement of Juvenile Court Records*, 71 A.L.R.3d 753 25

Miscellaneous—Continued Page

Annotation, *Judicial Expunction of Criminal Record of Convicted Adult*, 11 A.L.R.4th 956 . . . . . .16, 25
Annotation, *Offenses and Convictions Covered by Pardon*, 33 A.L.R.2d 1261 . . 6-7
Annotation, *Omnibus Crime Act-Firearms-Felons*, 13 A.L.R.Fed. 103 24-25
Annotation, *Pardon as Restoring Public Office or License or Eligibility Therefore*, 58 A.L.R.3d 1191 6
Annotation, *Right of Exonerated Arrestee to Have Fingerprints, Photographs or Other Criminal Identification of Arrest Records Expunged or Restricted*, 46 A.L.R. 3rd 900, new sections 24
Annotation, *State Pardon as Affecting "Convicted" Status of One Accused of Violation of Gun Control Act of 1968 (18 U.S.C. §§921 et seq.)*, 44 A.L.R. Fed. 692 4
Annotation, *Validity and Construction of Gun Control Laws*, 28 A.L.R.3rd 845 . . 6
Annotation, *Validity, Construction, and Application of Provisions of Omnibus Crime Control and Safe Streets Act of 1968 (18 U.S.C. Appx. §1202(a)(1), Making it Federal Offense for Convicted Felon to Possess Firearm*, 13 A.L.R.Fed. 103 6
Annotation, *What Action May be Required of Federal Agency in Suit by Individuals To Have Records Amended Pursuant to §83 of The Privacy Act of 1974 (5 U.S.C. §552a(a)(1)(A))*, 55 A.L.R.Fed. 338 . . 25
Black's Law Dictionary, 5th ed. (1979) . 27
Crimes and Punishment (Criminal Liability), 12 C.J. 955 53

Miscellaneous—Continued Page

Constitutional Law, VI. Personal, Civil and Political Rights, Personal Liberty, 16 C.J.S. 202 63-64
Constitutional Law, XI. Equal Protection of the Laws, Constitutional Guarantees, 16A C.J.S. 502 61
Constitutional Law, XI. Equal Protection of the Laws, Crimes and Criminal Procedure, 16A C.J.S. 563 52
Constitutional Law XI. Equal Protection of the Laws, Discrimination as to Localities, 16A C.J.S. 506 55
Conviction Defined, 40 J. State Bar of Calif. 36 (1965) 39
Cooley's Constitutional Limitations, 8th ed. (1927) 62
Curme, *English Grammar,* Harper & Row (1947) 27-28
Maitland's English Legal History (1908) . 58-59
Prior Convictions and the Gun Control Act of 1968, Columbia Law Review Vol. 76 (1976), 326 *et seq.* 25
Records and Recording Laws, 66 Am. Jur. 2d 465 *et seq.* 41
Roget's Thesaurus, 3rd ed. 27
Thorpe's Federal and State Constitutional History. 59
Webster's Third New International Dictionary (1965) 26-27
West's Southeastern Digest, Vol. 9, Constitutional Law-Contempt 53

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

No. 81-1180

G. R. DICKERSON, DIRECTOR, BUREAU OF ALCOHOL, TOBACCO AND FIREARMS, PETITIONER

v.

NEW BANNER INSTITUTE, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT

CONSTITUTIONAL PROVISIONS

The relevant constitutional provisions are reprinted in an appendix to this brief.

STATEMENT

Generally, "The Gun Control Act, created as Title IV (18 U.S.C. 921 *et seq.*) to amend the Omnibus Crime Control and Safe Streets Act of 1968, was enacted in the wake of the tragic assassinations of some of the nation's political and social leaders, to control the use of firearms through a system regulating the issuance of licenses to persons as federally licensed dealers of firearms", *United States* v. *Matassini*, 565 F.2d 1297, 44 A.L.R. Fed. 666 (5th Cir. 1978)

Title VII of the Omnibus Crime Control and Safe Streets Act (18 U.S.C. App. 1201-1203) addresses receipt, transportation and possession by persons considered to present a special threat to public safety.

Title VII overlaps Title IV, which makes it a federal crime for any person who has been convicted of a crime punish-

able by imprisonment for a term exceeding one year to engage in dealing in firearms. This appeal concerns only Title IV.

This court, in *United States* v. *Bass*, 404 U.S. 336, 30 L. Ed. 2d 488, 92 S. Ct. 515 (1971), indicated that while there is overlapping of such provisions, no conclusion can be drawn from §922 concerning the correct interpretation of the penal provisions of §1202, adding that each title reaches persons not reached by the other, and that Title VII complements Title IV by punishing a broader class. Moreover, title VII exempts felons who have received pardons containing provisions authorizing them to possess firearms. Title IV contains no exemptions, but there is authority for the view that a state pardon requires that a person no longer be regarded as convicted, thereby precluding a conviction under the Gun

Control Act. See, Annotation: *State Pardon As Affecting "Convicted" Status of One Accused of Violation of Gun Control Act of 1968* (18 U.S.C. §§921, *et seq.*) 44 A.L.R.Fed. 692; *United States* v. *One Lot Eighteen Firearms*, 325 F. Supp. 1326 (D.C.N.H. 1971). The court viewed the failure of the pardon to expressly provide that the defendant was authorized to carry firearms as not controlling on the ground that a pardon restores *all* rights, holding that it was expressly the felony record that the pardon was designed to erase. Citing *Matassini, supra.*

Where, as in the case *sub judice*, one earns his living by possession of firearms, twin spectres: "taking of property" and "amercements", both constitutionally proscribed, appear. (Resp. App. A, 109a-114a; for junctures see Resp. Brief in Opp. at XXVII). *Contra, Thrall* v. *Wolfe*,

503 F.2d 313 (7th Cir. 1974), cert. denied, 420 U.S. 972, severely criticized in *Matassini, supra* on the basis that the rationale of *Thrall*, extending to cases not involving licensing, would lead to the absurd result that a convicted felon receiving a state pardon authorizing him to possess firearms in compliance with §1203 (2) would be susceptible to a conviction under §922(h), constituting a trap that the court felt Congress had failed to set. Attention is also invited to *United States* v. *Barrett*, 504 F.2d 629 (6th Cir. 1974), aff'd, 423 U.S. 212, 65 S. Ct. 498, 46 L. Ed. 450, where the court, while noting §922(h) provides no exemption for anyone pardoned, held that a partial pardon, restoring only civil rights lost by a prior state felony conviction, and not remitting guilt nor any attendant penalty in consequence of the conviction, did not affect

defendant's convicted status so as to preclude his conviction for violations of §922(h). Defendant there was relying on §1203. The court held that statute did not apply under §922(h), but, even if it did, such would be unavailing because the pardon did not contain an express authorization to possess firearms. As to §1202(a)(1) making it a federal offense for a convicted felon to possess, see *Validity, Construction, and Application of Provision of Omnibus Crime Control and Safe Streets Act of 1968* (18 U.S.C. Appx. §1202(a)(1)) *Making It Federal Offense for Convicted Felon to Possess Firearms*, 13 A.L.R. Fed. 103 (§§3 (b) and 10); also *Pardon as Restoring Public Office or License or Eligibility Therefor*, 58 A.L.R.3d 1191, *Validity and Construction of Gun Control Laws*, 28 A.L.R.3d 845, and *Offenses and Convictions*

Covered by Pardon, 35 A.L.R.2d 1261.

The facts of the case *sub judice* have suffered on brief; therefore, judicial notice is craved to the court record in Iowa. Kennison (a minority stockholder of Respondent then on its board of directors) traveled from South Carolina to Iowa seek-reconciliation with his wife. He was arrested for kidnapping her in violation of Iowa Code §706.1 (carrying a maximum penalty of five years imprisonment), but that charge was dropped in favor of a proposal (a procedure) whereunder he would offer a plea of carrying a weapon in an automobile improperly cased in violation of Iowa Code §695.2, to be held in abeyance by the court pursuant to the deferred judgment procedure (Iowa Code §789.A.1 Pet. App. to his Brief at 3a). He accepted the proposal (although the weapon in violation was his wife's, his own being properly cased) upon

assurances that no conviction would stem from the procedure. The court then found that he "had not inflicted or attempted to inflict injury" and that he had not "used, threatened to use or displayed in threatening manner a dangerous weapon", and placed his so-called "guilty plea" on the shelf and him on probation. Then, on February 10, 1976, Iowa State Judge, William S. Cahill, on motion of the State, dropped that charge too, after rejecting the proffered plea and expunging even the record of the deferred judgment proceedings.

Nothing can be done *nunc pro tunc* even now to undo Petitioner's failure to have conducted a proper investigation *ab initio*, which would have prevented his abortive attempt to revoke the licenses (Pet. Br. 4). However, once "the Bureau (ne: Petitioner) subsequently learned"

of Kennison's "plea" and expungement (id., see also 30 and 38), how Bureau obtained such information (apparently irregularly) is worthy of inquiry. Iowa Code Ann. 692.1(5) and 692.2 (Pet. Br. 38) defines "conviction data" and outlines the correct procedure for disseminating criminal history data "only to criminal justice agencies, or such other public agencies as are authorized by the confidential records council." Absent a showing on this record, it is respectfully submitted, Petitioner never qualified thereunder, unless proceeding through the F.B.I., dehors the record also.

Ostensibly attempting to put such 20-20 hindsight to best advantage, Petitioner caused revocation notices to issue through an "informal hearing" in which he vindicated himself (albeit, through his multiple *alter ego* third person

singular "agency").

Respondent then called for the "formal hearing" before a trained judge who determined there had been no violations of law within the meaning of §923(e) involved because §924(a) required that Petitioner establish willfulness which he had failed to do (Pet. App. 47a, 50a-52a, 57a).

The Administrative Law Judge dismissed the §922(g) and (h) charges, and concluded the §923(d)(1)(B) charge as well, by finding there had been no notice, both as required under the Act and as protected under the United States Constitution (Pet. App. 52a).

Petitioner (then acting under another of his *alter egos*) switched from his role as advocate (in cotton) to that of Judge (in silk), and, while confirming the Administrative Law Judge on the §923(g) and

(h) questions, reversed him on the §923 (d)(1)(B) finding. (Pet. App. 37a-40a). Thus, the spectre of offending the separation of powers doctrine hovered into view, hereinafter discussed.

The appeal is also exascerbated with not only afflictions of tense, but person as well. The conjugation question will be dealt with also herein separately. Having failed, as advocate, but successful on review, as judge, Petitioner thus vindicated himself. (id. 40a).

Respondent then petitioned for review to the United States District Court for South Carolina on the constitutional issues. (Pet. App. 15a)[1] That court granted Petitioner summary judgment without a hearing, but was overturned by the Order,

---

[1] The appendix is really a joint one except as supplemented by Respondent to its Brief in Opposition.

herein being considered, from the Fourth Circuit which held: both, under *Lewis* v. *United States*, 445 U.S. 55 (1980), 60-61 and n.5, the expunction in Iowa was "affirmative action" tending to "remove disabilities", and under the common sense notion that since state convictions are allowed to trigger the Act, under a local option as it were, so should state removals be observed. (id. at 10a).

This argument assumes that further argument attempting to distinguish the authorities argued against in Respondent's Brief in Opposition (17 through 53) would be improper. *If not*, reference thereto is further craved.

SUMMARY OF ARGUMENT

I

New Banner Institute, Inc. v. *Dickerson*, 649 F.2d 216 (4th Cir. 1982) (Pet.

App. A, 1a-10a) at least should be affirmed both on the basis of *Lewis* v. *United States*, 445 U.S. 55 (1980) teaching that "Congress intended that a person whose conviction has been expunged under a state statute not be considered any longer 'convicted'" (Resp. Brief in Opposition at 22) (Pet. App. A, 9a), and that "the expunction of that charge upon the successful completion of his probation effectively removed that disability..." (Resp. Brief in Opposition at 23) (Pet. App. A, 10a). "Congress has expressly chosen to rely on state law in federal firearms legislation, however, by allowing the various states to decide which crimes will carry the possibility of a sentence in excess of one year that is necessary to trigger a federal firearms disability...Therefore, we see no anomaly in finding that Congress also intended to rely on state law for one

method of removing that disability..." (Pet. App. A, 9a-10a).

The ruling of the Fourth Circuit Court of Appeals should be affirmed because there never was a conviction.

Some jurisdictions hold that expungement is a matter of legislative rather than judicial concern. Others hold that such is legislative usurpation of judicial functions. Iowa expresses such concern through both.

Some jurisdictions hold there is a non-event as to conviction. Others hold that the event is wiped out. In a manner of speaking, it boils down to whether the "conviction" is a "had been" or a "never was". This is rather in the nature of a conundrum considering that persons in some jurisdictions are released, as here, "without an adjudication of guilt".

The problem exists largely because of

the teaching of this court in *Boykin* v. *United States*, 395 U.S. 238 (1969), that a plea of guilty is *per se* a conviction. *Boykin*, however, involved a plea of guilty to robbery and a sentence of death, held to have been involuntarily entered. We are dealing here with an altogether different situation. The plea here was not accepted by the court. There was no expungement arrangement in *Boykin* for laying the so-called "plea" upon the shelf, as it were, while the court considered whether to accept or reject it in response to the state's recommendation for a dismissal of the charge. No judgment was entered thereon here. There was no such accompanying statutory procedure in *Boykin*. The event in *Boykin* was a non-event here.

Most states, holding under a doctrine that forfeiture of bond is equivalent to conviction, also hold that "expungement

is equivalent to acquittal." See *Judicial Expunction of Criminal Records of Convicted Adult*, 11 A.L.R.4th 956.

While it would be presumptuous to attempt an *apologia* here for the decision of the Circuit Court, such are the spectacles through which this court reads and interprets from the top of the spectrum. Respondent is confident this court will read that decision both for what it says and means to say; both in its silences and utterances. Respondent urges this court to finish saying that which it began in *Lewis*, *supra*, and which was picked up by the Circuit Court here. While Kennison may properly have been considered as if he were under indictment or convicted in the law's eye (for purposes of administering 18 U.S.C. 923(d)(1)(B)) until the charge was dismissed and he was discharged from probation, in fact he was not convicted at all. He

is not to be considered any longer to have ever pleaded guilty to any charge at all. The evidence on this is uncontroverted in the record. See Order, In The District Court of Iowa In And For Des Moines County, *State of Iowa* v. *David Foster Kennison*, Criminal Cause No. 7595, Feb. 10, 1976.

II

Being local option on its face and thus capable of only geographic application, the Gun Control Act is unconstitutional. The Act leaves to the various states the responsibility of classifying an activity as one imposing a federal firearms disability. A proper concern for nonuniformity must extend beyond nonuniformity in the definitions of "conviction" to include nonuniformity in the "classifications" of an activity as "a crime punishable by imprisonment for a term exceeding one year". Petitioner's grievance

concerning the impact of nonuniformity upon the effectiveness of enforcement of the Gun Control Act is overshadowed by the threat of nonuniformity upon the equal protection guarantees of the United States Constitution. Thus, the proper forum for redress of Petitioner's grievance is the Congress of the United States, and the decision of the Circuit Court of Appeals should therefore be affirmed.

The remaining questions of unconstitutionality stem from the proposition that there was no conviction by operation of law, but go to the ultimate questions never reached on trial or appeal.

III

When the Administrative Law Judge ruled against Petitioner (at first then acting as advocate) on the 18 U.S.C. 922 (g) and (h) questions (See App. G. to Petition at 47a), and on the 18 U.S.C. 923

(d)(1)(B) question (App. G to Petition at 50a), the controversy was at an end.

When the Petitioner (then acting as judge) affirmed the Administrative Law Judge on the §922(g) and (h) questions and reversed him on the §923(d)(1)(B) question, the controversy had been resolved, and, even if not, the only remaining question would then have narrowed to: §923(d)(1)(B), e.g. "had Respondent received the notice required under 18 U.S.C. 923(e), in Section 27 U.S.C. 188.73 of the Code of Federal Regulations, and under the due process clauses of the Federal Constitution?" The facts and law, thus found adversely to Petitioner, could not have been revived by him.

The Administrative Law Judge considered *State* v. *Farmer*, 234 N.W.2d 89 (Supreme Ct. Iowa 1975) which held "if the defendant is discharged from probation

under #789A.6, no conviction occurs in the strict legal sense because no adjudication of guilt is made."

"The Respondent argues in light of the foregoing that the statute should be construed strictly. I agree." (Pet. App. G, 54a) The Administrative Law Judge then went on to discuss: "A plea of guilty is more than a confession..." in the context of *Kercheval* v. *United States*, 274 U.S. 220 (1927) and *Boykin* v. *United States*, 395 U.S. 238 (1969), *United States* v. *Locke*, 409 F. Supp. 600 (D. Idaho 1976), affirmed, 542 F.2d 800 (9th Cir. 1976), *United States* v. *Potts*, 528 F.2d 883 (9th Cir. 1975), and *Tembruell* v. *City of Seattle*, 392 P.2d 453 (Wash. 1964) where a plea of guilty coupled with an award of probation and subsequent dismissal was held not to add up to a "conviction of a felony" because when a conviction is expunged it

cannot longer be considered as a "conviction". "I have discussed (id. 57a) the foregoing case law in depth without drawing a conclusion. The purpose is merely to illustrate how confusing the issue is." And then, after indicating the "conglomeration of court decisions" held:

> "I hold (id. 58a) that the Government (Petitioner) has failed in this case to prove the charges in the notice of revocation and the applicant (Respondent) continues to hold the belief that none of the responsible individuals of the corporation (Respondent), including Mr. Kennison, have ever been convicted of a crime...."

Absent any showing at any hearing, based on the scintilla rule, this cause should be affirmed as presenting no justiciable controversy.

ARGUMENT

I. THE DISABILITIES IMPOSED BY THE GUN CONTROL ACT UPON ANY PERSON WHO "HAS BEEN CONVICTED" OF CERTAIN CRIMES DO

NOT APPLY TO A PERSON WHOSE CONVICTION HAS BEEN EXPUNGED; OR, AT LEAST, DO NOT APPLY TO A PERSON AFTER THE CHARGE AGAINST HIM HAS BEEN DISMISSED AND HE HAS BEEN DISCHARGED WITHOUT ENTRY OF JUDGMENT.

A. The Expungement Problem

To argue the forgiveness is complete but the stain remains is an outworn doctrine from the dark ages. This "conviction" has been "actually overturned or expunged" well within *Barker* v. *United States*, 579 F.2d at 1226 (Pet. App. 8a) (Resp. Br. in Opposition at 21); see also *United States* v. *Bergeman*, 592 F.2d at 537; *State* v. *Farmer*, *supra*; *United States* v. *Purgason*, 565 F.2d 1279, 1280 (4th Cir. 1977); *United States* v. *Fryer*, 545 F.2d 11, 13 (6th Cir. 1976); *United States* v. *Arrington*, 618 F.2d 1119 (5th Cir. 1980); *Lewis*, *supra*; *United States* v. *Brzoticky*, 588 F.2d at 775 (10th

Cir. 1978). The conviction, if any, was "actually" (theirs) overturned or expunged. *Barker* v. *United States*, 579 F.2d at 1226 (10th Cir. 1978). Under such "widely varying and frequently ambiguous state laws", it is only natural that the circuits reflect afflictions.

In the particular area concerning carrying of weapons (*sub judice*) there is only more wilderness. With respect to the particular event that transpired in Iowa, carrying a weapon improperly cased in a vehicle, only ten jurisdictions allow a punishment in excess of one year's imprisonment, twenty allow maximum sentences of from thirty days to a year, and twenty-one do not prohibit the practice at all.[2]

---

[2]Only 10 states qualify under the Gun Control Act by providing a "more-than-one-year-offense": CT, DE, IA, MD, MA, MI, NJ, ND, PA, and RI; while 20 jurisdictions provide such offense as only trifling (one year or less): AL, AZ, DC,

It is simply not possible to hold citizens accountable with "knowledge of the law as no excuse" while crossing imaginary political lines. It is as unjust, as it is unreal. The laws proscribing such conduct are no less widely varying than those providing expunctions. (See pages 63-64, *infra*.)

A panorama of such wilderness can better be seen through numerous A.L.R. annotations: *Right of Exonerated Arrestee to have Fingerprints, Photographs, or other Criminal Identification or Arrest Records Expunged or Restricted*, 46 A.L.R.3rd 900, new sections; *Omnibus Crime Act-Firearms-*

HI, IN, KY, MN, NH, NY, OH, OK, OR, SC, SD, TN, UT, VA, WA, WV, WI;

But such conduct is legal in 21 states! AK, AR, CA, CO, FL, GA, ID, IL, KA, LA, ME, MS, MO, MT, NE, NV, NM, NC, TX, VT, WY.

In VA, elements are left to determination of a jury.

In TN, while classified as a misdemeanor, no jail sentence is set by the statute (§39-4901).

Felons, 13 A.L.R. Fed. 103; *Judicial Expunction of Criminal Record of Convicted Adult*, 11 A.L.R.4th 956; *Expungement of Juvenile Court Records*, 71 A.L.R.3d 753; *What Action May be Required of Federal Agency in Suit by Individual to Have Records Amended Pursuant to §3 of the Privacy Act of 1974* (5 U.S.C. 552a (g)(1)(A)), 55 A.L.R. Fed. 338. In addition, are a number of law review articles, principally *Columbia Law Review* Vol. 76, 326 *et seq.*

Trying to juggle Petitioner's problem: A rule that gives effect to expunctions under widely varying and frequently ambiguous state laws makes effective enforcement difficult because of the task, at the same time, to afford equal protection and due process while maintaining the separation of powers. This is hard enough, but when it is attempted from the high, tight wire of the constitutional requirement to main-

tain balanced geographic due process, hampered by local option legislation depriving persons of property and interfering with their privileges and immunities, by denying with one hand full faith and credit to state legislation and state judicial acts, while the other hand is dealing out amercements, the task is virtually impossible. It is a balancing act that will not balance because it can't.

Therein lies the anomaly which the Circuit Court sought to avert, the anomaly that would result should this court give effect to so much of the Gun Control Act as triggers due to states' actions in reference to its application, while refusing to recognize their further actions in declassifying the crimes, disarming them or removing the enigmas as provided by state expunction laws.

Webster's Third New International

Dictionary (1965) at 803 has "expunge": L. Expungere: to mark for deletion. (1) to strike out, obliterate or (2) annihilate, syn. erase. *Black's Law Dictionary* 5th Ed. (1979) at 522 says: To destroy or obliterate; it implies not a legal act, but a physical annihilation. *Andrews* v. *Police Court of the City of Stockton*, 123 P.2d 128, 129 (Cal. App.). To blot out; to efface designedly; to obliterate; to strike out wholly. *Roget's Thesaurus* (3rd. Ed. at 691.7) places the index under "Destruction": obliteration, erasure, effacement, expunction, blot, blotting, cancellation, deletion.

Much of the discussion hinges on the phrase "has been convicted". Curme, *English Grammar* (Harper & Row, 1947) §119.C identifies "has been [convict]ed" as in the present perfect tense, "used to indicate that ... a [convicted] state has

begun in past time and is still continuing." In contrast, *id.* §119.D identifies "had been [convict]ed" as in the past perfect tense, indicating a "past [convicted] state as completed at or before a certain past time."

The conundrum is present: Does the expression "has been convicted" (used in the Gun Control Act), following dismissal of the charge and expungement under state law (which the federal government must recognize under full faith and credit), really mean "had been convicted" as Petitioner would have this honorable court believe (Pet. Br. 7-8)? The answer is clearly "no". Congress provided in a federal deferred judgment statute that "without entering a judgment of guilty ... the court shall discharge such person and dismiss the proceedings against him" (21 U.S.C. 844(b)). Congress

limited availability of this deferred judgment procedure to "any person who *has* [emphasis added] not previously been convicted ..." Obviously fully aware that this language would *not* deny availability to any person who was a previous beneficiary of this procedure, Congress found it necessary to express its intent to limit repeated availability by adding that "[d]ischarge and dismissal under this section may occur only once with respect to any person". Thus, Congress clearly recognized that, following a deferred judgment proceeding, a person would no longer fall under the description "has been convicted".

Apparently finding that Congress did know the difference between "has" and "had", the Fourth Circuit Court of Appeals concluded that Congress said exactly what it meant to say and that

"although Kennison *had* [emphasis added] indeed been 'convicted of' an offense triggering firearms disabilities, that fact could not serve as a predicate for a Gun Control Act violation or license revocation because his conviction had been expunged under the Iowa deferred judgment procedure". (Pet. Br. 6)

Respondent thus reads the Circuit to say that even if Congress failed to make it clear, Congress "also intended to rely on state law for one method of removing that disability". What is clear is that although Kennison, until the "expungement", may still have been (for purposes of administering 18 U.S.C. 923(d)(1)(B)) a "has been convicted" person, after Iowa removed any enigma under the "deferred judgment" statute, he became a "no longer has been convicted" person. (Pet. App. 10a-11a) That any "lingering disability"

was "effectively removed" adds a rather "arguendo" finality to all argument.

All of which material suggests the anomaly and paradox expressed herein from the Administrative Law Judge all the way through the Circuit Court, and featured in notes to numerous decisions of this Court. It is anomalous, where federal law is made to depend on state made criminal events, but where such criminal events have been annulled or aborted by such state events, to hold that the federal law operates as to one and not the other. The reason most often given is that it is opposed to common sense. No doubt these are the seeds of the "anomalies" and "common sense notions" at the root of nearly all pertinent decisions.

B. The Full Faith and Credit Problem

In keeping with its task, the Court, of course, should, as in all cases of

statutory construction, look to the Congressional purpose: to curb crime by keeping firearms out of the hands of those not legally entitled to possess them because of age, incompetency, or criminal background. (See Pet. Br. 24-25) Age and incompetency being not in issue here, the Court then need inquire only into the criminal background.[3]

There can be no valid argument but that states have the absolute right to grant pardons, amnesty, paroles, and perform all related police, judicial, legislative and executive activities. The full faith and credit clause requires every state, and the United States, to give to a judgment at least the *res judicta* effect which the judgment would

---

[3] Petitioner's reference to "arrests" (Br. 29, n. 14) is unacceptable. Even at trial, anything short of an actual conviction is inadmissable under both Federal Procedure Rules.

be accorded in the rendering state. *Durfee* v. *Duke*, 375 U.S. 106, 84 S. CT. 242, 11 L. Ed. 2d 186 (1963). Full faith and credit is due under federal as well as state law. *State* v. *Myers*, 638 S.W.2d 892 (Mo. App. 1976). Statutes as well as judgments are within the ambit of this clause. *Caroll* v. *Lanza*, 349 U.S. 408, 75 S. Ct. 804, 99 L. Ed. 1192 (1955). But see, *Yacovone* v. *Bolger*, 207 U.S.103, 645 F.2d 1028 (1981).

Thrall v. *Wolfe*, 503 F.2d 313 (7th Cir. 1974), cert. denied, 420 U.S. 972, holds that in imposing on convicted felons otherwise appropriate disqualifications from regulated activities, Congress has the power to accord state pardons differing effects in differing contexts, depending on its objectives in creating such disqualifications.

Moreover, considerations of comity

are held to require the federal courts not to intervene over the administration of state criminal laws. *Vaught* v. *State of Missouri*, 265 F. Supp. 933 (Mo. 1967). Notions of comity are posited on a proper respect for state functions and a recognition that our national government will fare best if the states and their institutions are left free to perform their functions without federal interference. *Fisher* v. *Federal National Mortgage Association*, 360 F. Supp. 207 (D.C. Md. 1973).

Kremer v. *Chemical Construction Corporation*, 102 S. Ct. 1883 (1982) at 1889:

> "Section 1738 [of 28 U.S.C.A.] requires federal courts to give the same preclusive effect to state court judgments that those judgments would be given in the courts of the state from which the judgments emerged.[6]"

Id. n. 6:

> "In the Act of May 26, 1970, ch. 11, 1 Stat. 122, Congress required all federal courts to give

> such preclusive effect to state court judgment 'as they have by law or usage in the courts of the State from which they are taken.' In essentially unchanged form, the Act, now codified as 28 U.S.C. §1738 (1976), provides that 'The ... judicial proceedings of any court of any such State ... shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State ...'
>
> "Accordingly, the federal courts consistently have applied res judicata and collateral estoppel to causes of action and issues decided by state courts. *Allen* v. *McCurry*, 449 U.S. 90, 96, 101 S.Ct. 411, 416, 66 L.Ed.2d 308 (1980); *Montana* v. *United States*, 440 U.S. 147, 99 S.Ct. 970, 59 L.Ed.2d 210 (1979); *Angel* v. *Billington*, 330 U.S. 183, 67 S.Ct. 657, 91 L.Ed. 832 (1946)."

§1738 has not been repealed. However, if there has been a partial repeal, it must be implied. *Allen, supra*. But, it is a cardinal principle of statutory construction "that repeals by implication are not favored." *Radzanower* v. *Touche Ross & Co.*, 426 U.S. 148, 154, 96 S. Ct. 1989, 1993, 48 L. Ed. 2d 540 (1976);

United States v. *United Continental Tuna Corp.*, 425 U.S. 164, 168, 169, 96 S. Ct. 1319, 1322, 47 L. Ed. 2d 653 (1976). Whenever possible, statutes should be read consistently. *Posadas* v. *National City Bank*, 296 U.S. 497, 503, 56 S. Ct. 349, 352, 80 L. Ed. 351 (1936).

The principle of full faith and credit is central to our system of jurisprudence. The concept is as old as the Constitution and was upheld early in *Hampton* v. *McConnell*, 3 Wheat 234, 235, 4 L. Ed. 378 (1818) (C.J. Marshall).

The concensus thus appears that federal courts must give full faith and credit to all state official acts. *Franklin National Bank* v. *Karkow*, 295 F. Supp. 910 (D.C.D.C., 1969); *Huron Holding Corp.* v. *Lincoln Mine Operating Co.*, 312 U.S. 183, 61 S. Ct. 513, 85 L. Ed. 1550 (1941); *O'Connor* v. *Stanley*, 54 F.2d 20 (8th Cir.

1931); *Chase* v. *Pope*, 247 F. Supp. 110 (D.C. Tenn. 1965); but see *Baldwin* v. *Iowa State Traveling Men's Association*, 283 U.S. 522, 51 S. Ct. 517, 75 L. Ed. 1244 (8th Cir. 1931) which holds only that full faith and credit is not involved where neither of the courts is a state court.

Now, 18 U.S.C. §927 must be brought into the calculus, which provides:

> "No provision of this chapter shall be construed as indicating an intent on the part of Congress to occupy the field in which such provision operates to the exclusion of the law of any state on the same subject matter, unless there is a direct and positive conflict between such provision and the law of the state so that the two cannot be reconciled or consistently stand together."

State expunction statutes, when read in conjunction with §922(h)(1), help bring the word "convicted" into proper focus.

Had Congress intended national uniformity and/or equal protection, it could easily have described a federal standard through which to sieve, as it were, the kaleidscope of state statutes. What it did do is an integral part of the statutory scheme.[4]

While it is true:

> "In the absence of an expression to the contrary, Congress generally intends federal criminal law to receive a uniform application", *United States* v. *Bergeman*, 592 F.2d at 534 (9th Cir. 1979).

But, in the Gun Control Act, Congress clearly expressed itself.

To say (Pet. Br. 7, 8): "A person who 'has been convicted'" and "whose conviction is later 'expunged' under a state ...statute nevertheless remains a person

---

[4] To make the statute clear of Constitutional taint, Congress could have resorted to the ancient Prohibition law type definitions which successfully withstood uniformity attacks.

who 'has been convicted'" is no more than a play on words. (See pp. 27-30, *supra*) Like some playwright, Petitioner attempts to make *Lewis, supra* say just the opposite of what it says.

Nevertheless, it is well settled:

> "Unless Congress conveys its purposes clearly, it will not be deemed to have significantly changed the federal-state balance." *United States* v. *Bass*, 404 U.S. 336 (1971).

See *Conviction Defined*, 40 J. State Bar of California 36 (1965). The option was also provided with an erasure.

This court should resist Petitioner's invitation to legislate further.

Congress was aware that the states are free to define crime, to provide penalties therefor, impose sentences and that such crimes as well as such penalties would vary widely. Judge Ely, in *United States* v. *Benson*, 605 F.2d 1093 (9th Cir. 1979) makes this clear. So, many states

have found it peculiarly fitting to leave the Act beyond the compass of local law.

Congress never intended to force state penal systems into a mold of uniformity because of a vague desire to assist enforcement. It, therefore, seems obvious we are treading in geographic constitutionally posted areas. See *Kelly* v. *Immigration and Naturalization Service*, 349 F.2d 473 (9th Cir. 1965) at 475.

Doe v. *State*, 328 A.2d 784 (N.H. 1978); *In Re. J.*, 37 App. Div. 2d 717, 325 N.Y.S.2d 235 (1971); and *S.* v. *N.Y.*, 32 N.Y.2d 592, 347 N.Y.S.2d 54, 300 N.E. 426 (1973), apparently hold that even without statutory provisions, the original courts have inherent powers to annul their own records.

The Privacy Act, 5 U.S.C. §552(a) provided federal agencies which collect, maintain, use or disseminate records with

authorization to expunge or revise such records, and intended that such actions apply to errors of judgment or opinion.[5] *R.R.* v. *Department of the Army*, 482 F. Supp. 770, 55 A.L.R.Fed. 327 (D.C.D.C. 1980).

C. "Convicted of" v. "Charged With"

The Gun Control Act is concerned only with the crime defendant is convicted of, as opposed to the crime he is charged with. The undisputed evidence here is that Kennison offered a plea, although never charged, and that that plea was not accepted; nor was he tried. This is clearly a hybrid. See *United States* v. *Glasgow*, 478 F.2d 850 (8th Cir.), cert. denied, 414 U.S. 485 (1973).

Although the Act turns on state felony-misdemeanor classifications, there

[5] See, generally, 66 Am. Jur. 2d, *Records and Recording Laws*, §§465, *et seq.*

is nothing to prohibit a state from classifying its felonies and misdemeanors differently, and from time to time doing so. They are thus seen coming in and going out from beneath this umbrella. Moreover, there is nothing to prohibit jurisdictions from classifying felonies and misdemeanors on the basis of actual sentence.

Thus, one can slip the disability by plea to a lesser charge. Thereby Congress has more remotely even, but more locally, as it were, placed the option in the hand of the local solicitor. Depending on whether that individual is in the gun business would portend controlling consideration because the impact would be devastating. (See pp. 57-59, *infra*.) In any event, the open-end bargain is a gaping loophole, the availability of which, in a greater sense, filters down at last to

suit the individual or his counsel.

If a defendant is unaware that he can thus come in or go out from such reach or coverage, or does not realize that his state expungement does not operate to terminate disabilities, due process is thereby *per se* offended. These considerations did not attend those cases relied on by Petitioner emanating from Fifth, Eighth and Ninth Circuits, but should have alerted them when this court spoke in *Bass*. Compare *United States* v. *Kelly*, 519 F.2d 794; *United States* v. *Hoctor*, 487 F.2d 270 (9th Cir. 1973); *United States* v. *Andrino*, 497 F.2d 1103, 1107 (9th Cir. 1974); *United States* v. *Mostad*, 485 F.2d 199 (8th Cir. 1973). (See also Res. Br. in Opp., pp. 17-53.)

With all these eccentricities and vagaries of state laws, Congress simply is unable to satiate Petitioner's unsatis-

fied uniformity longings.

The fact that Congress has placed indictees under the gun, so to speak, is of no moment because such is a temporary station only and the "go" light will flash, releasing them upon exoneration.

D. Other Laws

While 18 U.S.C. 927 provides that no provision thereof shall be construed as indicating an intent by Congress to occupy the field in which such provision operates to the exclusion of the law of any state on the same subject matter, unless there is a direct and positive conflict between such provision and the law of the State so that the two cannot be reconciled or consistently stand together, and South Carolina has such a law (Criminal 1976 S.C. Code §16-23-10, *et seq.* and Gun Control in Title 23, Chapter 31-10, *et seq.*).

In this jurisdiction, persons "regularly exposed to what are determined by the division (State Law Enforcement Division) to be dangerous circumstances" can gain permits but must undergo an investigation "to determine his qualification" upon filing a $2,000.00 bond guaranteeing any judgment arising out of the use. The qualifications exclude "any person who has been convicted of a crime of violence in any court of the United States, the several states...drunkard, drug addict, mentally incompetent." However, "had been convicted" is not defined here either. Yet, state expunction statutes when read in conjunction with §922(h)(1), are brought more into clear focus.

As said, if Congress had intended those jurisdictions opting under the Gun Control Act, not to embrace individuals whose records had been expunged, it like-

ly would have said so. Not having done that, it appears it relied on state judicial action entirely. To suppose otherwise would indeed be anomalous, even paradoxical. Congress has relied clearly on a hodge-podge of vague state laws and never once mentioned the inapplicability of concurrent state expungement laws. It is veritably impossible to establish a negative, but this is close.

Petitioner's attempted analogy to state pardons and expunctions (Pet. Br., pp. 38-39) is clearly inappropriate[6] in that there can be no pardon or expunction

---

[6] Petitioner's inference to the contrary stems from his erroneous application of procedures specified in Iowa Code §789.A.6 for restoration of rights to convicted persons following discharge from probation. §789.A.6 does specify the automatic expungement of "the court's criminal record with reference to deferred judgment" as the appropriate procedure to be followed "[u]pon discharge from probation" in those cases where" judgment has been deferred under section 789.A.1. (App. to Pet. Br. at 6a) (Pet. at 6).

therefrom here, since the state of Iowa holds that no conviction occurred. Thus, Petitioner is asking this honorable court to tell Kennison that he would be better off had he actually been convicted under Iowa law; then, at least, he would be eligible for a pardon! This is almost *reductio ad absurdum*. Thus, Kennison's expunction was clearly "unconditional and absolute" and "effectively removed that [firearms] disability." (Pet. App. at 10a).

II. THE GUN CONTROL ACT IS LOCAL OPTION ON ITS FACE AND THUS CAPABLE OF ONLY GEOGRAPHIC APPLICATION; IT PRESCRIBES PROHIBITED AMERCEMENTS; IT UNLAWFULLY RESTRICTS PERSONAL LIBERTY; IT IS A BILL OF ATTAINDER; AND IT IS THEREFORE UNCONSTITUTIONAL.

A. <u>The Local Option</u>

This Act clearly leaves its applica-

tion trigger to the separate states: to classify, or not, any activity as felony, or otherwise, and, if the latter, to fail to draw such (mis)conduct under its umbrella. This is local option and/or state nullification by legislative enactment. It should behoove this court to legislate no further, but only to declare that such Congressional purpose cannot be squared with the equal protection provisions of the United States Constitution.

This proves Petitioner's fourth proposition (Pet. Br. at 30): "A Rule that gives effect to expunctions under widely varying and frequently ambiguous state laws would seriously hamper effective enforcement of the Act." In the shadow of the Constitution, it is impossible to apply this law evenly, while at the same time giving effect to the provisions of the Act applying state felony convictions

discriminately.

Petitioner can only apply, or cope with as best he can, what Congress has done. It has given the law to some but not to others similarly situate.

The Uniform Firearms Act RCW 9.41. 160 interpreted as authorizing prosecuting officials to charge violations of that act either as a gross misdemeanor or as a felony, was held unconstitutional as violating equal protection relating to privileges and immunities. *Olsen* v. *Delmore*, 295 P.2d 324, 48 Wash. 2d 545 (1956).

A directive which contained limitations upon carrying firearms by court reporters which did not apply to clerk of court and judges' law clerks similarly situated were held to violate the constitution as having made no reasonable distinction on its face and exceeding any lawful governmental purpose in violation

of the equal protection clause. *Association of Surrogate's and Supreme Court Reporters* v. *Evans*, 424 N.Y.S.2d 818, 102 Mis.2d 883 (1979).

It would appear that to permit the states' arbitrary classifications on a geographical basis, of American citizens who commit identical acts, to define the reach of a federal statute placing limitations on the carrying of firearms is not based on natural, intrinsic or constitutional distinctions. See n.2, pp. 23-24, *supra*. See also *People* v. *Cannizzarro*, 31 P.2d 1066, 138 Cal. App. 28 (1934).

For instance, a statute authorizing prosecutors to be paid from costs taxed against persons convicted thereunder was held to deny equal protection because such statutes were local option to only certain counties. *State ex rel. White* v.

Board of County Commissioners Wyandotte County, 39 P.2d 286, 140 Kan. 744 (1934).

Where provisions of Pub. Loc. Laws, N.C. 1925, c. 114 §2 applied to only five counties in the prohibition law, it was held to contravene the equal protection since it conferred privilege not enjoyed by other residents of the state, who were subject to imprisonment for first offense. *State* v. *Fowler*, 136 S.E. 709, 193 N.C. 290 (1927).

Where the same argument was made respecting the kidnapping law, it was held not to violate equal protection in light of the fact that it applied to all who violate it without exception. *U.S.C.A. Const. Amend. XIV; State* v. *Fulcher*, 243 S.E.2d 338, 294 N.C. 503.

The ultimate test is whether or not the law operates without discrimination on all persons and classes of persons

similarly situated. 16A C.J.S. *Constitutional Law*, §563, text and cases collected. The legislation must bear equally on all in the same class. *State of Louisiana ex rel. Francis* v. *Resweber*, 329 U.S. 459, 67 S. Ct. 374, 91 L. Ed. 422, rehearing denied, 330 U.S. 853, 67 S. Ct. 673, 91 L. Ed. 1295.

And so it has been held a statute is void as contravening the equal protection guaranty which makes an act a crime when committed by one person, but not so when committed by another in the same situation. *Niemotko* v. *State of Maryland*, 340 U.S. 268, 71 S. Ct. 325, 328, 95 L. Ed. 267, of which makes punishable acts which were not so when committed (Id. n.15) or which makes the question as to whether a certain act is criminal or not depend on an arbitrary or unreasonable distinction between persons or classes of persons

committing it. See n. 16 and *12 C.J.* §955, p. 1186. Different degrees of punishment are likewise prohibited under the equal protection clause. See §564 and cases gathered. This has nothing to do with heinousness or gravity which are permissible in the discriminations permitted. Classes of persons are permitted where reasonable, such as guardians, minors, convicts, habitual offenders (by increasing the punishment). See also cases collected in *West's Vol. 9, Southeastern Digest,* and supplement thereto, bound and pocket parts. See also cases found in *U.S.C.A. Amendment XIV,* §*1,* and supplements and parts thereto especially [582. Sectional or geographical discrimination]. At Id. n. 590, *Helms* v. *Jones*, 621 F.2d 211 (5th Cir. 1980), probable jurisdiction noted 101 S. Ct. 737, reversed 101 S. Ct. 2434, is reported as while making

the same crime a felony if abandoning parent leaves the state or abandons child after leaving the state, as denying equal protection and infringing upon fundamental rights to travel. Entitlement to equal protection should be empahsized in the guilt-determining process, but not so stressed in sentencing. *ACMR, 2 M.J. 987 (1976), affirmed 3 M.J.101.*

The basic principle remains, under the equal protection clause no one can be subjected for the same offense to any greater or different punishment than that to which others of the same class are subjected, *State* v. *Kallas*, 94 P.2d 414, 97 Utah 492 (1939); *State* v. *Thomas*, 69 So. 2d 738, 224 La. 431 (1954). Where two criminal statutes operate to prohibit identical activity, require identical proof, and yet impose different penalties, to sentence a defendant to the extended

term or higher penalty is violative of the equal protection. *State* v. *Wilson*, 397 N.E.2d 1206, 60 Ohio App. 2d 377 (1978), affirmed 388 N.E.2d 745, 58 Ohio St. 52; *People* v. *Marcy*, 628 P.2d 69 (Colo. 1981).

The Equal Protection clause applies not only to unreasoned distinctions based on race or relative affluence, but also to those based on accidents of geography. *Richards* v. *Townsend*, 303 F. Supp. 793 (D.C. Cal. 1969). 16 A *Conatitutional Law*, C.J.S., p. 324 provides citations to the sources holding that insofar as it grants privileges to or places burdens on, individuals or limits or restricts their rights, especially the right to engage in a particular business (as Respondent here was attempting to do), such are held to be invalid as geographically discriminatory.

Equal protection is offended where the prosecution has discretion to charge with either felony or misdemeanor where the elements in each statute are not distinguishable. *State* v. *Richards*, 621 P.2d 165, 27 Wash. App. 703 (1980).

Since Congress remained silent concerning common law crimes or those involving open-end sentencing, and left to the discretion of state courts in causes tried either to the court or to it and a jury, trivial offenses were not blanketed in or brought under the umbrella. *United States* v. *Shulthsis*, 486 F.2d 1331 (4th Cir. 1973). States have the right to both classify, or declassify crimes as well as penalties therefor.

Where two statutes provide disparate penalties for identical conduct, equal protection is violated. *People* v. *Montoya*, 582 P.2d 673, 196 Colo. 111 (1978);

State v. *Martell*, 591 P.2d 789, 22 Wash. App. 415 (1979). See *infra*, pp. 59-60.

For all of the reasons outlined by Petitioner on brief, Congress has spoken, and Congress has remained silent, not without reason. Petitioner should be sent to Congress for proper redress. This is not the proper forum.

B. The Amercement Problem

To amerce citizens concerning their means of livelihood was condemned in this country from the beginning. Justice Douglas called it "making defendant suffer anew the deprivation of his rights." *Loper* v. *Beto*, 405 U.S. 473 (5th Cir. 1972).

U.S. Constitution, Amendment VIII:

> "Excessive bails shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

"Following the Norman Conquest of England in 1066, the old system of penal-

ties which ensured equality between crime and punishment, suddenly disappeared. By the time systematic judicial records were kept, its demise was almost complete. With the exception of certain grave crimes for which the punishment was death or outlawry, the arbitrary fine was replaced by a discretionary amercement. Although the amercement's discretionary character allowed the circumstances of each case to be taken into account and the level of cash penalties to be increased or decreased accordingly, the amercement presented an opportunity for excessive or oppressive fines. The problem of excessive amercements became so prevalent that three chapters of Magna Carta were devoted to their regulation. Maitland said of Chapter 14 that 'very likely there was no clause in the Magna Carta more grateful to the mass of the people.' Chapter

14 clearly stipulated as fundamental law a prohibition of excessiveness in punishments:

> 'A free man shall not be amerced for a trivial offense; and for a serious offense he shall be amerced according to its gravity, *saving his livelihood*; and a merchant likewise: in the same way a villain shall be amerced saving his wainage; if they fall into our mercy. And none of the aforesaid amercements shall be imposed except by the testimony of reputable men...'"

The English Bill of Rights, enacted December 16, 1689, stated that "excessive bail shall not be required, nor excessive fines imposed..." These words were chosen for our Eighth Amendment and implanted into the Virginia Constitution of 1776 and those of Delaware, Maryland, New Hampshire, North Carolina, Massachusetts, Pennsylvania and South Carolina. *1 Thorpe 7 F. Thorpe, Federal & State Constitutions*, 3813 (1909). (Resp. Add. App. 111a).

This case serves as a classic exam-

ple of that particular mischief because Kennison (its victim) was made a felon by the merest chance of being in the wrong place (Iowa) at the wrong time. In his native South Carolina, where the offense is but a trifling one (by comparison), he would not have come under the local option, while doing exactly what the Constitution was framed to do: encouraging freedom of travel among the several states. See *Yick Wo* v. *Hopkins*, 118 U.S. 356, 6 S. Ct. 1064, 30 L. Ed. 220. Congress should be required to write its laws, especially its penal and forfeiture laws, even-handedly, non-selectively and non-arbitrarily, to insure judges are required not to apply general laws sparsely, selectively and spottily. (Resp. App. 113a).

Equal protection to all is the basic principle on which justice rests under the law. *Pierre* v. *State of Louisiana*,

La., 306 U.S. 354, 59 S. Ct. 536, 83 L. Ed. 757. All persons subjected to state legislation should be treated alike under similar circumstances both in privileges conferred and liabilities imposed. *State of Louisiana ex rel Francis* v. *Resweber, infra; Smith* v. *State of Texas*, 311 U.S. 128, 61 S. Ct. 164, 85 L. Ed. 84, and scores of cases 16A *Constitutional Law*, P. 297, Sec. 502, C.J.S. The right to operate a business is a property right within Constitutional protection of the Fourteenth Amendment.

The right of citizens to freely travel about the colonies existed prior to the adoption of the Constitution, and in view of the Ninth Amendment, was never revoked thereby. *Rosehill Cemetery Co.* v. *City of Chicago*, 185 N.E. 170, 352 Ill. 11, 87 A.L.R. 742.

Bluntly put, in circumstances simi-

lar to Kennison's, the citizens in South Carolina are absolutely shielded along with those in forty-one (41) jurisdictions subject to the United States Constitution, from the punishing effects of the Gun Control Act. No set of men are entitled to privileges but in consideration of public service. Not only is Kennison deprived of the property he has in his job or vocation, but he is segregated for different treatment--for punishment where others go scot free, all in like circumstances. See *Cooley's Constitutional Limitations*, 554 *et seq.*

Any claim that this is within the police power must be sustained only on the ground that such exercise thereof does not supersede the law of the land; that general public law designed to operate without exception or partially throughout the land. The bell, as it

were, tolls only for ten out of the fifty-one jurisdictions examined. This does not seem right. Bringing so few to arrest of rights is clearly arbitrary and unnatural.

C. The Personal Liberty Question

The right to the enjoyment of life and liberty is one of the fundamental, natural rights, *West Virginia State Board of Education* v. *Barnette, W. Va.*, 319 U.S. 624, 63 S. Ct. 1178, 87 L. Ed., 1628, 147 A.L.R. 674, protected by inclusion in the Constitution, but not derived from, or dependent on, the federal Constitution, *Screws* v. *U.S.*, 140 F.2d 662 (5th Cir. 1944), reversed on other grounds, 325 U.S. 91, 65 S. Ct. 1031, 89 L. Ed. 1495, 162 A.L.R. 1330; *Culp* v. *U.S.*, 131 F.2d 93 (8th Cir. 1942). It is one of the most valuable and sacred rights; as sacred as the right of property, 16 C.J.S. *Constitutional Law* 202, at p. 987 occupying even a preferred

position contrasted to property rights. *Hall* v. *Hawaiian Pineapple Co.*, 72 F. Supp. 533 F. (D.C. Hawaii 1947)

It consists in the right of locomotion, changing situation, removing one's person to whatsoever place one's inclination may direct without any let, hindrance, care of restraint; and it is regarded as inalienable. See cases collected, p. 987, id.

Any unlawful interference with the right of personal liberty may be resisted and it is a constitutional function of the American judiciary to protect it against official invasions operating under legal form (Id. at 989). It also includes the right to travel and to have property and to pursue trade, business or calling. It is part of the aggregate of the greater right of the "Pursuit of Happiness" (Id. §208).

D. The Bill of Attainder Problem

Had the hearings been held and the other issues involving equal protection, expunction, full faith and credit, personal liberty and pursuit of happiness aspects, the due process, burden of proof presumption problems been introduced and decided, it would also have been claimed that the Act is a bill of attainder within the proscription of Art. 1 §9 of the Constitution.

It has been held: *People* v. *Camerlingo*, 131 P. 601, 69 Cal. App. 466, that a statute prohibiting the possession of firearms by one previously convicted of a felony is no deprivation thereunder because "such conviction" must first be judicially established. (App. A, 66a-68a).

III. NO JUSTICIABLE CONTROVERSY IS PRESENT. THE ONLY CONTROVERSY RAISED BY PROPER NOTIFICATION, PURSUANT TO

18 U.S.C. 923(f)(1), HAD ALREADY BEEN RESOLVED WHEN PETITIONER AFFIRMED THE ADMINISTRATIVE LAW JUDGE'S DECISION.

A. The Due Process Problem

The Administrative Law Judge (Br. in Opp. 55) determined:

> "DISCUSSION-Only one ground exists upon which the licenses in this case may be revoked and it is found under Section 923(e) of Title 18 of the United States Code. It is also mentioned in Section 188.73 of Title 27 of the Code of Federal Regulations. The law provides that after notice and opportunity for hearing the Secretary may revoke any license issued under this section if the holder has violated any provisions of Chapter 44, or any rule or regulations prescribed by the Secretary under this Chapter. We have uniformly held that there must be a willful violation. The regulation provides that whenever the Regional Regulatory Administrator has reason to believe that a licensee has 'willfully' violated any provision of the Act or regulation, he may issue a notice of contemplated revocation. This amounts to the same thing and it is the beginning of revocation proceedings.

"This case is very simple. I am totally convinced, from the evidence, that the Respondent did not willfully violate any provisions of Chapter 44 or the Regulations. When the Respondent stated that neither Mr. Kennison nor any of the others involved in the company had ever been convicted of a crime punishable by imprisonment for a term exceeding a year it did not willfully commit a violation. At the time, the Respondent was convinced that these answers were absolutely correct. Even now, the Respondent feels that Mr. Kennison has not been convicted of any felony at all. The Respondent's officers are convinced and they have been told by their attorneys that although there was a guilty plea, there was never an entry of judgement and the case was dismissed. This they are told does not amount to a conviction of anything and if they were required to answer such a question again in writing they would again say 'no'. Accordingly, we can not, by any stretch of the imagination, call their actions willful.

"The Bureau of ATF apparently reasons that although we have not had a willful violation of the United States Code or the regulations, we have had a conviction. This is, under the prevailing court decisions, correct. Under the case law cited hereafter, Mr. Kennison can be considered a person who has been convicted of a crime punishable by imprisonment for a term exceeding one

year. Although Mr. Kennison disagrees with this, he is wrong. Although he honestly believes that the Government is wrong, he is wrong and the Government is correct. He was in fact convicted of a felony. Accordingly, the Bureau of ATF could deny renewal of his application for license and prevail. The reason for this is that under the law and regulations, it is unlawful for a convicted felon to ship or transport any firearms or ammunition in interstate or foreign commerce and it is also unlawful for a person such as Mr. Kennison to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce. These provisions are found in 18 U.S.C. 922(g) and (h). Under Section 923(d)(1)(B), an application would be denied on the grounds that the applicant is prohibited from transporting, shipping or receiving firearms or ammunition in interstate or foreign commerce under Section 922 (g) and (h) of this chapter. The Bureau of ATF apparently feels that this also forms a basis to revoke a license. In other words, if the holder of a license is convicted of a crime punishable by a term of imprisonment exceeding one year why not revoke his license during revocation proceedings because the license, which must be renewed yearly, can not be renewed. Why merely follow form over substance and dismiss the revocation proceedings only to go into a denial proceedings soon there after, and take the license

> away by denial of renewal. Why not merely revoke it now and get it over with.
>
> "The answer to the foregoing question is that a license holder must have due process and the law must be followed. He must have notice and opportunity for hearing. He has had no notice that the license would be revoked merely on the grounds of a crime punishable by imprisonment for a term exceeding one year. The only notice he received was that revocation would be based upon the willful falsification of each of the applications by failing to say 'yes'." (Petitioner's Appendix, pp. 50a-52a).

In the original transcript (T. 20), Petitioner contended that the sole issue "here today" is to "determine whether or not this license should be revoked on the grounds that in the application they failed to state that he has been convicted of a crime punishable by imprisonment for a term exceeding one year." When Petitioner subsequently came from behind the bar and sat on the bench, it not only offended the separation of powers, but

unfairly permitted him to, in effect, change the rules of the game after he had lost.

To permit Petitioner to now portray Respondent as arguing matters not raised on trial or below is like the pot calling the kettle black; like tarring Respondent with Petitioner's own brush. Not only that, but Petitioner reneged on his trial promise not to pursue such a line, but to await the expiration of the license and simply refuse to renew it. Respondent argued this constitutes some form of estoppel.

While putting round pegs into square holes, Petitioner has never explained how he proceeded *ab initio* against Respondent on filing a false application based on §923(d)(1)(D) (that single issue!) and converted the hearing to revocation proceedings based on §923(d)(1)(B).

§923(f)(1) provides persons whose applications are denied or a holder of a license which is revoked shall receive a written notice from the "Secretary" stating the grounds of denial or revocation. Subsection (2) thereunder provides that if the Secretary denies an application for, or revokes a license, he shall, upon request by the aggrieved party, promptly hold a hearing to review his denial or revocation and stay the action accordingly.

Obviously, this is what the Administrative Law Judge was referring to when holding "the law must be observed".

Moreover, the Administrative Law Judge, in his rulings on Respondent's proposed conclusions of law, stated: "I have grave doubts about calling Kennison's plea a conviction. I need not face that issue here...If Mr. Kennison is ever faced with such an issue for allegedly

having violated 18 U.S.C. App. 1202 or 18 U.S.C. 922(g) or (h), this question might be tested by the Courts..."

Then the Administrative Law Judge, in his rulings on Petitioner's proposed conclusions of law, held that he knew of no case which held that a criminal court action such as that which involved Mr. Kennison was considered a conviction for all purposes. He went on to notice that it was the intention of the Iowa court and legislature to keep Mr. Kennison's record clean so that he would not be burdened with a conviction record in the event that he should encounter just such a situation as the one at hand. He wound up by stating directly with respect to due process: "Only one ground exists upon which the licenses in this case may be revoked and it is found under Section 923(e) of Title 18 of the United States

Code. It is also mentioned in Section 188.73 of Title 27 of the Code of Federal Regulations. The law provides that after notice and opportunity for hearing, the Secretary may revoke any license issued under this section if the holder has violated any provision of Chapter 44, or any rule or regulation prescribed by the Secretary under this Chapter...This case is very simple. I am totally convinced from the evidence, that Respondent did not willfully violate any provisions of Chapter 44 or the Regulations....there was never any entry of judgment and the case was dismissed...

"The answer to the foregoing question is that a license holder must have due process and the law must be followed. He must have notice and opportunity for hearing. He has had no notice that the license would be revoked merely on the

grounds of conviction of a crime punishable by imprisonment for a term exceeding one year. The only notice he received was that revocation would be based upon willful falsification of each of the applications by failing to say 'yes'... If the agency is to revoke a license based upon a felony conviction, the license holder should receive notice and have an opportunity for a hearing thereon. No such notice has ever been given. I am also of the opinion that the conviction alone is not grounds for revocation."

The Administrative Law Judge also noted that the word "conviction" means final consummation of the prosecution of the accused, including the judgment or sentence rendered pursuant to a court ascertainment of his guilt. The statute being criminal, must be strictly construed according to the *lex forum*. The Admini-

strative Law Judge, on this record, expressly found the court of Iowa never accepted Kennison's guilty plea which would have been indispensible for a conviction to ensue.

B. Shifting the Burden of Proof

This argument is placed here because it stems from the denial of notice. If such notice had been given, Respondent's position would have followed this line. Fifth and Fourteenth Amendment problems are involved. This relates to the §923 (d)(1)(B) charge first leveled by Petitioner when, putting on his judicial hat and robe, he changed the rules of the game he had lost.

Those aspects of presumptions of fact and law created in the Gun Control Act were not challenged at the only hearing held because no notice or opportunity to be heard thereon was given.

The criteria for judging the constitutiionality of a statutory presumption is set forth in *Leary* v. *United States*, 89 S. Ct. 1532 (1969). There is a presumption of validity, however, one test is whether there was a "rational connection" between the basic fact and the presumed fact. *Mobile J. & K. C. R. Co.* v. *Turnipseed*, 219 U.S. 35, 31 S. Ct. 136, 55 L. Ed. 78 (1910). Another is whether the legislature might have made it a crime to do the thing from which the presumption authorized an inference. *Ferry* v. *Ramsey*, 277 U.S. 88, 48 S. Ct. 443, 72 L. Ed. 796 (1928), and a third was whether it would be more convenient for the defendant or the prosecution to adduce evidence of the presumed fact. *Morrison* v. *California*, 291 U.S. 82, 54 S. Ct. 281, 78 L. Ed. 664 (1934).

However, in *Tot* v. *United States*,

319 U.S. 463, 63 S. Ct. 1241, 87 L. Ed. 1519 (1943), the court singled out one of these tests as controlling. The *Tot* court had before it a federal statute which, as construed, made it a crime for one previously convicted of a crime of violence to receive any firearm or ammunition in an interstate transaction. The statute further provided that "the possession of a firearm or ammunition by any such person shall be presumptive evidence that such firearm or ammunition was shipped or transported or received, as the case may be, by such person in violation of the Act." The court, relying upon a prior decision in a civil case, held that the "controlling" test for determining the validity of a statutory presumption was "that there is a rational connection between the fact proved and the fact presumed." In *Tot*, the court stated:

> "Under our decisions a statutory presumption cannot be sustained if there is no rational connection between the fact proved and the ultimate fact presumed, if the inference of the one from proof of the other is arbitrary because of lack of connection between the two in common experience. This is not to say that a valid presumption may not be created upon a view of relation broader than that a jury might take in a specific case. But where the inference is so strained as not to have a reasonable relation to the circumstances of life as we know them it is not competent for the legislature to create a rule governing the procedure of the courts." (319 U.S. at 467-468, 63 S. Ct. at 1245 (footnotes omitted)).

Such a struggle is in progress today in South Carolina. Under our system of checks and balances, it will probably be thus now and forever. This raises an even broader question of the improper usurpation or separation of powers doctrine. Nevertheless, *Leary*, continued, that *Tot* reduced to the states of a corollary another test which has some sup-

port in prior decisions; whether it was more convenient for the defendant or the government to supply proof of the ultimate fact which the presumption permitted to be inferred. The *Tot* court stated that "[t]he argument from convenience is admissible only where the inference is a permissible one..." 319 U.S. at 469, 63 S. Ct. at 1246. The court rejected entirely another suggested test with some backing in the case law, according to which the presumption should be sustained if Congress might legitimately have made it a crime to commit the basic act from which the presumption allowed an inference to be drawn. For example, it was argued in *Tot* that in order to regulate interstate commerce in firearms Congress might have prohibited possession of ALL firearms by persons who had been convicted of crimes of violence.

Applying the "rational connection" test, the Court held, in *Tot*, that that presumption was unconstitutional. The Court rejected the contention that, because most of the states forbade intrastate acquisition of firearms without a record of the transaction or registration of ownership, it could be inferred (merely from possession) that an acquisition for which there existed no such records must have been interstate, by noting the alternative possibilities that unlawful intrastate acquisition or interstate shipment prior to the beginnings of regulation could also explain the absence of such records.

The two subsequent cases in which this Court ruled upon the constitutionality of criminal statutory presumptions, *U.S.* v. *Gainey*, 380 U.S. 63, 85 S. Ct. 754, 13 L. Ed. 2d 658 (1965), involving

companion sections of the Internal Revenue Code dealing with illegal stills, and *U.S.* v. *Romano*, 382 U.S. 136, 86 S. Ct. 754, 15 L. Ed. 210 (1965), regarding the question of whether a jury could infer from the defendant's presence at an illegal still that he was "carrying on" the business of distiller "unless the defendant explains such presence to the satisfaction of the jury" under 26 U.S.C. 5601 (a)(4) and 5601(b)(2), clarify the issue.

Gainey taught that the presumption should be tested by the "rational connection" standard learned from *Tot*, but added that the process of making the determination of rationality is, by its nature, highly empirical, and that, in matters not within specialized judicial competence or completely commonplace, significant weight should be accorded the capacity of Congress to amass the stuff

of actual experience and to cull conclusions from it. Applying these principles, the Court sustained the *Gainey* presumption, finding that it "did no more than accord to the evidence, if unexplained, its natural probative force." 380 U.S. at 71, 85 S. Ct. at 759.

The presumption attacked in *Romano* was identical to that in *Gainey* except that it authorized the jury to infer from the defendant's presence at the still that he had "had possession, custody or *control* [emphasis added]" of the still. See 26 U.S.C. 5601(a)(1). That presumption is much like the one in this Gun Control Act. That presumption was ruled invalid because, although "carrying on" and physical presence are very probably connected with an illegal enterprise, absent a showing of defendant's function at the still, its connection with posses-

sion is too tenuous to permit a reasonable inference — the inference of the one from the proof of the other being arbitrary.

Respondent holds here that the facts, that Kennison (a) was a member of the Board of Directors and (b) owned one-sixth of the stock, are far too tenuous a foundation on which to support a presumption that he was "in control" of Respondent corporation. It is almost absurd.

By this process of reasoning, it becomes clear that, with respect to 18 U.S.C 923(d)(1)(B) [referred to at page 2 of the District Court Order] (including in the case of a corporation any individual possessing, directly or indirectly the power to direct or cause the direction of the management and policies of a corporation being prohibited from transporting or receiving firearms in interstate

commerce under 18 U.S.C. 922(g) and (h)), the presumption goes too far in licensing a reasonable inference that Kennison did, in fact, have management control of Respondent corporation, as a matter of law, with not even a scintilla of supporting evidence. While the District Court characterized this as "overwhelming evidence", Respondent submits that it is arbitrary, unreasonable, and even irrational. Where is the evidence indeed?

It would be far more convenient for Petitioner to supply proof of the ultimate fact, if a hearing were to be held. Furthermore, that fact, sought to be inferred, is not classified as a presumption in the statute at all. The argument from convenience is admissible only where the inference is a permissible one. The process of arriving at such a judicial determination is highly empirical and in

matters not within specialized judicial competence nor, much less, completely commonplace. To amass such "stuff of actual experience and cull conclusions from it" is, in this case, sheer sophistry and indulgence of the worst sort.

CONCLUSION

This cause grew out of an application by Respondent to Petitioner for licenses under the Gun Control Act.

Petitioner, following the required investigation, granted the licenses. Later, he attempted to revoke them on the ground that he had come across — apparently irregularly — information that Respondent corporation, in submitting the applications, had failed to disclose a felony conviction concerning one of the members of its board of directors, while he was temporarily in Iowa seeking a reconciliation with his family.

Pursuant to 18 U.S.C. 923(f)(2), the matter came for trial before an Administrative Law Judge on the "single issue" of an alleged violation of §923(d)(1)(D) of the Act (willful failure to disclose). The Administrative Law Judge found in

favor of Respondent on the ground that, even if there had been such a failure to disclose, there was not a scintilla of evidence to support willfulness, a *sine qua non* to the offense.

In closing argument, Petitioner, as advocate, attempted to beef up a flagging cause by inserting the sucker (just below the root of the issue) argument that Respondent's licenses should be revoked anyway, alleging that Respondent was not qualified for the licenses under §923(d)(1)(B) of the Act, which requires that:

> "(B) applicant (including, in the case of a corporation ... any individual possessing, directly or indirectly, the power to direct or cause the direction of the management and policies of the corporation ...) is not prohibited from transporting, shipping, or receiving firearms ... under section 922(g) and (h) of this chapter;"

in that a member of Respondent's board of directors did possess such power and was

so prohibited by §922(g) and (h).

The Administrative Law Judge ruled that, since §923(f) of the Act required prior notice of such issue, and none had been given, nor had such issue been framed for trial, to make a determination thereon would offend the notice requiremens of Constitutional due process in addition to those of the Act. He determined also that, even so, there was not a scintilla of evidence that such board member possessed such power over Respondent.

Petitioner then, as reviewing authority (judge), affirmed the Administrative Law Judge on the "single issue", re §923(d)(1)(D), but reversed him on the §923(d)(1)(B) determination, vindicating his own advocacy.

Respondent, claiming violations of due process and equal protection, brought

the matter to the District Court, which, without a hearing, granted summary judgment to the Petitioner.

Alleging additional due process violations by that Court, and (for the first time, on appeal, being the first given opportunity) establishing and invoking jurisdictional essentials which may be raised for the first time at any appropriate stage, Respondent sought and obtained reversal by the Circuit Court.

The Circuit Court predicated its decision on the teaching of this Court in *Lewis* v. *U.S.*, 445 U.S. 55, 100 S. Ct. 915, 63 L. Ed. 2d 198 (1980), that since the Act triggers on State convictions, once those have been removed by pardon "or otherwise" (expunction in this instance), the federal authorities (Petitioner), while bound by State laws to trigger the Act in proper instances, are

equally bound by State laws which remove the conviction (trigger).

The Circuit Court found such view to be in keeping with the "common sense" doctrine laid down by this Court. It also accepted that magisterium for the lesson that Congress intended that a person whose conviction has been expunged under a state statute "not be considered any longer as 'convicted'". "By allowing the various states to decide which crimes will carry the possibility of a sentence in excess of one year that is necessary to trigger a federal firearms disability ... Therefore, we see no anomaly in finding that Congress also intended to rely on state law for one method of removing that disability."

In sum, it appears first that the Administrative Law Judge was absolutely correct; therefore no justiciable contro-

versy remains for consideration. Further along, it appears that the District Court compounded the due process and equal protection violations both statutorily and Constitutionally: (1) by finding on the record (without pointing to or specifying any place in particular, but everywhere in general) dehors the record, and (2) by refusing either to conduct *de novo* proceedings as subject (fact basis) for the predicate event (grant of summary judgment), or, to remand for proper framing and trial of the added "sole issue". Rather, the District Court, wounding Respondent anew, read into the record a failed issue.

Thus compounded Respondent applied to the Circuit Court: (1) to vindicate the trial record, (2) to right the newly visited wrongs, and (3) to invoke jurisdictional issues, which, had such been

reached, would have been dispositive if dealt with on Constitutional grounds.

That there is no justiciable controversy beyond the trial level seems as clear as the noon day.

That the District Court forced a silent record to speak seems equally clear. That it broke every rule in the book in respect to the application of Summary Judgment in the presence of a factual determination remaining is pellucid.

That there was no conviction in the State court requires a bit of exertion, but is then, at least, equally clear on this record: (1) that the Iowa Court took a conditional plea, put such upon the shelf, as it were, and invoked a special statutory procedure which was followed and resulted in the rejection of the proferred plea, ending the judicial process

short of conviction; or (2) that, *arguendo* (denied) the "plea" went on to "conviction" and judgment, but that (a) it was wiped out as either a "never was" or a "had been" event (preferably the former), and (b) Iowa, having optioned-under the Gun Control Act as to the weapons offense herein, had optioned-out by invoking the special statutory procedures relating to expunction and deferred judgment, and that Petitioner is equally bound by both events ironically engraved on this record.

This cause is the ideal vehicle to advance and clarify the doctrine of *Lewis* by teaching that a state expungement is well within that compass, at least, which states that the status ceases, of the disability ceases, abates, discontinues, disappears, terminates, concludes, winds up or ends one way or

another, as to both the status and/or the disability, then and forever, without tithe, diminution, stain, guilt, punishment, amercement, forfeiture, bill of attainder, or otherwise.

The law is clear that the records of Iowa remain only for an administrative consultation to detect repetitious application of the deferred judgment procedure in excess of that provided by law. The first two original sins, as it were, can be blotted out, obliterated, cancelled or cleansed, and the remaining limited view of the record is solely for the purpose determining eligibility and is unconcerned with culpability.

Only ten of the fifty-one jurisdictions examined with reference to the application of State laws to the "concealed weapons" incident involved herein can so much as qualify under the Gun Control Act.

Thus, this defines and at once identifies the culprit offending equal protection. Of course, this view must be vindicated by proper authority. This Court is admirably so qualified. This issue cuts to the very root; and thus, jurisdictionally seated, controls.

(Let is be noted, that Respondent is not attempting to argue that Congress had no authority, constitutionally or otherwise, to enact the Gun Control Act, but to the contrary, if Congress does act, it must act totally under Federal Statutes as to the conduct which will require punitive sanctions. To do otherwise arbitrarily applies the law in disregard of equal protection and burdens the right of mobility. Presumption of "Knowledge of the Law" is time honored, but the Gun Control Act extends the presumption in an arbitrary and capricious manner, because,

under the statute, the Defendent is presumed to have knowledge not only of the Federal Criminal Law but also of the State criminal law of *all* the states he may ever travel to, in, or through. This presumption, then, is an unlawful, or, at least, a bad extension of that presumption.)

The air needs cleaning. Citizens of South Carolina, while traveling so freely in Iowa, do not need this federal burden threatening the very freedom of intercourse amoung the sister States which afforded the fulcrum upon which the confederation consideration ultimately turned.

When some are privileged and others must suffer, for the same mischief, under the same Federal statute, equal protection becomes the victim. Her screams can be heard even up here.

It was not right for Petitioner to

act as his own advocate and then vindicate himself, as judge, in the finals. Thus, all these issues, which Respondent would have raised had he been given proper notice and a hearing, should be addressed, and this cause disposed of in either the simplest or most complicated manner as this Honorable Court may find appropriate, meet, and just.

All of which is most respectfully submitted.

JACK F. McGUINN and
LEWIS C. LANIER,
Attorneys for
Respondent

August 1982

APPENDIX

U. S. Constitution, Article I, §9:

> "... No Bill of Attainder or ex post facto law shall be passed. ..."

U. S. Constitution, Article IV, §2:

> "The Citizens of each State shall be entitled to all the Privileges and Immunities of Citizens in the several States. ..."

U. S. Constitution, Amendment V:

> "... nor shall any person be ... deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

U. S. Constitution, Amendment VIII:

> "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

U. S. Constitution, Amendment IX:

> "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

U. S. Constitution, Amendment X:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, of to the people."

U. S. Constitution, Amendment XIV, §1:

> "... No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Petitioner's Reply Brief

Office - Supreme Court, U.S.
FILED
NOV 19 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1180

In the Supreme Court of the United States

OCTOBER TERM, 1982

G.R. DICKERSON, DIRECTOR, BUREAU OF ALCOHOL, TOBACCO AND FIREARMS, PETITIONER

v.

NEW BANNER INSTITUTE, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

TABLE OF AUTHORITIES

Page

Cases:

Boykin v. *Alabama*, 395 U.S. 238 2

Fonville v. *McLaughlin*, 270 A.2d 529 2

Hackett & Freeman v. *Graves*, 103 Iowa 296, 72 N.W. 528 7

Iowa Beer & Liquor Control Department v. *McBlain*, 263 N.W.2d 226 ..... 6, 7

Kolios v. *INS*, 532 F.2d 786, cert. denied, 429 U.S. 884 2

People v. *Bartsch*, 37 Colo. App. 52, 543 P.2d 1273 2

People v. *Goetz*, 26 Ill. App. 3d 680, 327 N.E.2d 516 2

People v. *Jacquez*, 196 Colo. 569, 588 P.2d 871 6

Reed v. *State*, 295 A.2d 657 2

State v. *Baker*, 133 N.J. Supper. 398, 336 A.2d 762 2

State v. *Dassinger*, 294 N.W.2d 926 6

State v. *Ege*, 274 N.W.2d 350 7

State v. *Farmer*, 234 N.W.2d 89 6

State v. *Hanna*, 179 N.W.2d 503 ..... 5, 6, 7

State v. *Holmes*, 222 Kan. 212, 563 P.2d 480 2

United States v. *Benson*, 605 F.2d 1093 1

Page

Cases—Continued:

United States v. *Brzoticky*, 588 F.2d 773 1

United States v. *Lehmann*, 613 F.2d 130 1

United States ex rel. Burgess v. *Lindsey*, 395 F. Supp. 404 2

Vasquez v. *Courtney*, 272 Or. 477, 537 P.2d 536 6

Walker v. *District Court*, 606 P.2d 70 2

Statutes and rule:

Investment Company Act of 1940, 15 U.S.C. (& Supp. V) 80a-1 *et seq.* 2

15 U.S.C. 80a-2(10) 2

15 U.S.C. 80b-2(6) 2

Narcotic Addict Rehabilitation Act of 1966, 18 U.S.C. (& Supp. IV) 4251 *et seq.* 2

18 U.S.C. 4251(e) 2

18 U.S.C. 922(g) 1, 3, 5, 6, 7

18 U.S.C. 922(g)(1) 3

18 U.S.C. 922(h) 1, 3, 5, 6, 7

18 U.S.C. 922(h)(1) 3

18 U.S.C. 925(c) 4

28 U.S.C. 2901(f) 3

Iowa Code § 789A.1 (1975) 4

Page

Statutes and rule—Continued:

Iowa Code Ann. (West 1979 & Cum. Supp. (1982):

§ 813.2 (Rule 8.2(b)) 4
§ 907.9 4

Fed. R. Crim. P. :

Rule 11(d) 3
Rule 11(f) 3

Miscellaneous:

Annot. 14 A.L.R.3d 1272 (1967 & Cum. Supp. 1982) 2

[This Page Intentionally Left Blank]

In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 81-1180

G.R. DICKERSON, DIRECTOR, BUREAU OF ALCOHOL, TOBACCO AND FIREARMS, PETITIONER

v.

NEW BANNER INSTITUTE, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

Respondent and amicus curiae National Rifle Association contend (see Resp. Br. 14, 16-17; Am. Br. 1, 11) that the decision of the court of appeals should be affirmed on the alternative ground that Kennison was never "convicted" of a crime under Iowa law because a final judgment was not entered against him. The court of appeals correctly held (Pet. App. 6a), however, that "Kennison's plea of guilty to the Iowa charge of carrying a concealed weapon must be regarded as a 'conviction' " within the meaning of 18 U.S.C. 922(g) and (h).[1]

---

[1]See also, *e.g.*, *United States* v. *Lehmann*, 613 F.2d 130, 135 (5th Cir. 1980); *United States* v. *Benson*, 605 F.2d 1093, 1094-1095 (9th Cir. 1979). Contra, *United States* v. *Brzoticky*, 588 F.2d 773,775 (10th Cir. 1978).

1. The terms "convicted" or "conviction" do not not have the same meaning in every federal statute. At times, those terms clearly apply to any person whose guilty plea has been accepted, whether or not a final judgment has been entered.[2] For example, 15 U.S.C. 80a-2(10), a provision of the Investment Company Act of 1940, 15 U.S.C. (& Supp. V) 80a-1 *et seq.*, states (emphasis added):

> "Convicted" includes a verdict, judgment, or *plea of guilty*, or a finding of guilt on a plea of nolo contendere, if such verdict, judgment, plea, or finding has not been reversed, set aside, or withdrawn, *whether or not sentence has been imposed.*

See also 15 U.S.C. 80b-2(6). In other statutes, however, the term "convicted" is limited to persons against whom a final judgment has been entered. For example, 18 U.S.C. 4251(e), a provision of the Narcotic Addict Rehabilitation Act of 1966, 18 U.S.C. (& Supp. V) 4251 *et seq.*, states (emphasis added):

---

[2]This meaning may well be the more common one. In *Boykin* v. *Alabama*, 395 U.S. 238, 242 (1969), this Court stated unequivocally: "A plea of guilty is more than a confession which admits that the accused did various acts; it is itself a conviction; nothing remains but to give judgment and determine punishment." Similarly, it has been held that acceptance of a guilty plea constitutes a conviction within the meaning of statutes dealing with deportation of aliens (see, e.g., *Kolios* v. *INS*, 532 F.2d 786, 790 (1st Cir.), cert. denied, 429 U.S. 884 (1976)), impeachment of witnesses (see, e.g., *State* v. *Baker*, 133 N.J. Super. 398, 399-400, 336 A.2d 762, 763 (App. Div. 1975); Annot., 14 A.L.R. 3d 1272 (1967 & Cum. Supp. 1982)), conviction as a habitual offender (see, e.g., *Walker* v. *District Court*, 606 P.2d 70, 73 (Colo. 1980), conviction for firearms offenses (see Pet. App. 6a (citing cases); *State* v. *Holmes*, 222 Kan. 212, 213, 563 P.2d 480,481 (1977)), eligibility to serve in the state legislature (*Fonville* v. *McLaughlin*, 270 A.2d 529,530 (Del. 1970)), continuation of a bail bond (*People* v. *Bartsch*, 37 Colo. App. 52, 543 P.2d 1273 (Ct. App. 1975); crediting time spent on probation against a subsequent sentence (*People* v. *Goetz*, 27 Ill. App. 3d 680, 681, 327 N.E. 2d 516,517 (1975)), and eligibility for or revocation of parole (*Reed* v. *State*, 295 A.2d 657,659 (Me. 1976); *United States ex rel. Burgess* v. *Lindsey*, 395 F.Supp. 404, 411 (E.D. Pa. 1975)).

> (e) "Conviction" and "convicted" mean *the final judgment* on a verdict or finding of guilty, a plea of guilty, or a plea of nolo contendere, and do not include a final judgment which has been e xpunged by pardon, reversed, set aside, or otherwise rendered nugatory.

See also 28 U.S.C. 2901(f).

The meaning of the term "convicted" in 18 U.S.C 922(g) and (h) is not defined by statute, but there is no reason to suppose that Congress meant that term to apply only to those persons against whom a formal judgment has been entered and not to those who have pleaded guilty to a qualifying offense and have convinced a judge that there is a sufficient factual basis for their plea. Congress' unmistakable intent in enacting 18 U.S.C 922(g) and (h) was to keep firearms out of the hands of presumptively risky people. Any suggestion that Congress intended to wait until the formal entry of judgment before imposing federal firearms disabilities upon such persons is refuted by 18 U.S.C. 922(g)(1) and (h)(1), which apply not only to persons convicted of qualifying offenses but also to those under indictment for such crimes. It is hard to imagine why Congress would have wanted to keep firearms out of the hands of persons who have been indicted but not persons who have pleaded guilty but against whom a final judgment has not been entered. An indictment merely signifies that a grand jury has found probable cause that the defendant committed the charged offense, while acceptance of a guilty plea means not only that the accused has voluntarily admitted his guilt, but also that the judge is satisfied there is a factual basis for the plea. See, e.g., Fed. R. Srim. P. 11(d) and (f). There is consequently all the more reason to keep firearms out of the hands of such persons.

2. The argument advanced by respondent and amicus is really nothing but a semantic variation of the issue addressed in our opening brief. The question in this case is whether federal firearms disabilities apply to a person who has been adjudicated guilty of a qualifying state offense but who has been granted relief from that adjudication under a state e xpunction statute. It would be absurd if the answer to that question turned upon the labels attached under the state e xpunction statute. For purposes of the federal firearms laws, it should make no difference whether state law provides for the entry of a final judgment and its subsequent e xpunction or whether the state achieves precisely the same practical result by establishing a procedure whereby a final judgment is never entered. Thus, if we are correct that federal firearms disabilities continue to attach to a person against whom a formal judgment of conviction for a qualifying offense is entered and subsequently e xpunged under state law, the same result should obtain where a person who has pleaded or been found guilty of a qualifying state crime is treated under a state e xpunction law that avoids the entry of a formal judgment.

In this case, Kennison was conclusively adjudicated to have committed a serious firearms offense in violation of Iowa law. He voluntarily admitted his culpability and apparently convinced the Iowa court that there was a factual basis for his guilty plea. See Iowa Code § 813.2, Rule 8.2(b) (West 1979 & Cum. Supp. 1982). He was treated under Iowa law the same as a person against whom a verdict of guilty had been returned. See Iowa Code § 789A.1(1975). See also Iowa Code Ann. §907.9 (West 1979 & Cum. Supp. 1982). He is accordingly a presumptively risky person whom Congress did not wish to entrust with firearms unless special relief was granted by the Secretary of the Treasury. See 18 U.S.C 925(c). Congress could not have intended to treat Kennison differently from any other person with an

e xpunged state conviction merely because Iow procedure avoided the entry of a formal final judgment against him.

3. Amicus contends (see Br. 11-12) that the meaning of the term "convicted" in 18 U.S.C. 922(g) and (h) depends upon whether the jurisdiction in which the prior proceedings took place would regard the defendant as having been "convicted." In our opening brief, we attempted to show that effective enforcement of the federal gun control laws would be seriously hampered by a rule that gives effect to e xpunctions under widely varying and frequently ambiguous state laws. See Br. 30-42. Similar undesirable results would be produced if the meaning of the term "convicted" in 18 U.S.C. 922(g) and (h) depended upon state law.

Just as the meaning of the terms "convicted" and "conviction" is not the same in every federal statute, state courts have recognized that the meaning of these terms may vary from statute to statute. Indeed, the Supreme Court of Iowa has written (*State* v. *Hanna*, 179 N.W.2d 503, 507-508 (1970)):

> The word "conviction" is of equivocal meaning, and its use in a statute presents a question of legislative intent.
>
> In the restricted or technical legal sense in which it is sometimes used, the word "conviction" includes the status of being guilty of, and sentenced for, a criminal offense * * * . Stated otherwise technically the word means the final consummation of the prosecution against the accused including the judgment or sentence rendered pursuant to an ascertainment of his guilt.
>
> In its general and popular sense and frequently in its ordinary legal sense, the word "conviction" is used in the sense of establishment of guilt prior to and independently of judgment and sentence by a verdict of guilty or a plea of guilty.

See also, e.g., *State* v. *Dassinger*, 294 N.W.2d 926, 927 (S.D. 1980); *People* v. *Jacquez*, 196 Colo. 569, 588 P.2d 871 (1979); *Vasquez* v. *Courtney*, 272 Or. 477, 479, 537 P.2d 536,537 (1975).

Thus, absurd results would frequently follow if the meaning of the term "convicted" in 18 U.S.C. 922(g) and (h) depended upon state law. Federal courts, required to decide whether a particular disposition would be regarded as a "conviction" under state law, would confront state decisions holding that "[t]he word 'conviction' is of equivocal meaning, and its use in a statute presents a question of legislative intent" (*State* v. *Hanna, supra*, 179 N.W. 2d at 507). Therefore, the federal courts would be led back to the question of Congress' intent in enacting 18 U.S.C. 922(g) and (h)—or perhaps to the question of what the state courts would view as Congress' intent in the unlikely event that they had occasion to address that issue.

The present case illustrates the difficulties that amicus' argument would produce. To support its contention that the disposition of Kennison's case was not a "conviction" under Iowa law, amicus relies upon *State* v. *Farmer*, 234 N.W.2d 89, 92 (Iowa 1975), in which the Supreme Court of Iowa, citing *Hanna*, stated that "[i]f the defendant is discharged from probation under [the Iowa deferred judgment statute], no conviction occurs *in the strict legal sense* because no adjudication of guilt is made" (emphasis added). But as the citation to *Hanna* makes clear, it does not follow that the same court would not view the disposition of Kennison's case as a "conviction" in that term's "general and popular sense and frequently in its ordinary legal sense" (*State* v. *Hanna, supra*, 179 N.W.2d at 508).

Amicus also relies upon *Iowa Beer & Liquor Control Department* v. *McBlain*, 263 N.W. 2d 226,227 (Iowa 1977), where the court held that disposition under the deferred

judgment statute was not a conviction within the meaning of the state statute authorizing suspension of a liquor license upon the conviction of an employee for selling beer to a minor. In light of the discussion in *Hanna*, however, *McBlain* can hardly be read to mean that the Iowa courts would not regard a disposition under the deferred judgment statute as a "conviction" within the meaning of any statute.

This is made clear by *State* v. *Ege*, 274 N.W.2d 350, 355-356 (Iowa 1979), a subsequent decision of the Supreme Court of Iowa holding that a provision of state law permitting a witness to be "interrogated as to his previous conviction for a felony" applied to a witness who "had been found guilty of forgery, was given a deferred sentence * * * and had successfully completed the period of probation set by the court" (*id.* at 355). The trial court, relying on the dictum in *Farmer*, had held that "when the conditions of a deferred judgment have been completed there is no 'conviction' within the meaning of the [statute in question]" (*ibid.*). However, the Iowa Supreme Court, noting (*ibid.*) that "[t]he word 'conviction' may have different meanings within different conte xts," concluded that in the conte xt at issue, that term included " 'the ascertaining of the guilt of the accused,' " as well as " 'judgment thereon by the court' " (*id.* at 356, quoting *Hackett & Freeman* v. *Graves*, 103 Iowa 296, 298-300, 72 N.W. 528, 529 (1897)).

In sum, the Supreme Court of Iowa has not held that a disposition under the deferred judgment statute may not constitute a "conviction" under any statute. Instead, if called upon to construe the term "convicted" in a statute like 18 U.S.C. 922(g) and (h), that court would apparently look to the "legislative intent" (*State* v. *Hanna, supra*, 179 N.W. 2d at 507). If, as amicus maintains, Congress' intent in enacting 18 U.S.C. 922(g) and (h) was to be bound by state law, the result would be endless reasoning in circles.

For these reasons and the reasons discussed in our opening brief, it is therefore respectfully submitted that the judgment of the court of appeals should be reversed.

REX E. LEE
Solicitor General

NOVEMBER 1982

DOJ-1982-11

Amicus Brief

Office - Supreme Court, U.S.
FILED
SEP 10 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1180

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

G.R. DICKERSON, DIRECTOR, BUREAU OF ALCOHOL, TOBACCO AND FIREARMS,
Petitioner

v.

NEW BANNER INSTITUTE, INC.,
Respondent

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

~~MOTION FOR LEAVE TO FILE BRIEF AND~~ BRIEF AMICUS CURIAE OF THE NATIONAL RIFLE ASSOCIATION OF AMERICA

DAVID T. HARDY *
RICHARD E. GARDINER
Office of the General Counsel
NATIONAL RIFLE ASSOCIATION
1600 Rhode Island Avenue, N.W.
Washington, D.C. 20036
(202) 828-6348

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

1. Should a state's determination of whether a person has been convicted of a violation of that state's law be followed in determining whether that person has been convicted within the meaning of Title I of the Gun Control Act of 1968, 18 U.S.C. 922(g) and (h)?

2. Was Respondent convicted, within the meaning of Title I of the Gun Control Act of 1968, 18 U.S.C. 922(g) and (h), pursuant to Iowa law?

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-1180

G.R. DICKERSON, DIRECTOR, BUREAU OF ALCOHOL, TOBACCO AND FIREARMS,

Petitioner

v.

NEW BANNER INSTITUTE, INC.,

Respondent

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OF THE NATIONAL RIFLE ASSOCIATION OF AMERICA

The National Rifle Association of America (NRA), by and through counsel, hereby moves this Court, pursuant to Rule 42, Rules of the United States Supreme Court, for leave to file a brief *amicus curiae*. In support of this motion, as required by Rule 42(3), the NRA states that it is a not-for-profit membership association of approximately 2.4 million individual members. First among its purposes and objectives is the protection and defense of the Constitution of the United States, especially with reference to the right of each law-abiding American citizen to acquire, possess, transport, carry, transfer

ownership of, and enjoy the right to use arms as guaranteed by the Second Amendment to the United States Constitution in order that the people may always be in a position to exercise their legitimate individual rights of self-preservation and defense of family, person, and property, as well as to serve effectively in the appropriate militia for the common defense of the Republic and the individual liberty of its citizens.

In furtherance of these purposes and objectives, the Association monitors the administration and enforcement of the federal firearms laws and, where appropriate, has sought administrative and judicial interpretations of such laws so that such laws least infringe upon the right of peaceful Americans to own and lawfully use firearms. Thus, the Association is interested in the instant case for several reasons: 1) there is a significant constitutional issue relating to the federal-state balance, the resolution of which will have an impact on determining whether the enforcement of "gun control" laws is primarily the duty of the states or of the federal government and which neither the Petitioner nor the Respondent has adequately briefed; 2) the outcome of this case will have an impact on the scope of the administrative and enforcement powers of the Bureau of Alcohol, Tobacco and Firearms, an agency which has all too frequently abused its powers and directed its efforts toward making cases against non-violent individuals; 3) the Association's concern that merely being charged with a violation of a state "gun control" law could lead to an individual's being deprived, for life, of his right to receive a firearm; and 4) the Association's concern that the criminal justice system be able to turn its attention to those who actually commit acts of violence and away from those peaceful citizens who fall prey to "gun control" laws.

To date, although oral consent has been received from both the Petitioner and the Respondent, written consent

has not been received. At such time as written consent is received, it will be filed with the Court forthwith.

Respectfully submitted,

DAVID T. HARDY *

RICHARD E. GARDINER

Office of the General Counsel
NATIONAL RIFLE ASSOCIATION
1600 Rhode Island Avenue, N.W.
Washington, D.C. 20036
(202) 828-6348

* Counsel of Record

September 3, 1982

TABLE OF CONTENTS

	Page
Statement	1
Argument	2
I. A state's determination of whether a person has been convicted of a violation of that state's law should be followed in determining whether that person has been convicted within the meaning of Title I of the Gun Control Act of 1968, 18 U.S.C. 922(g) and (h)	2
II. Respondent was not convicted, within the meaning of Title I of the Gun Control Act of 1968, 18 U.S.C. 922(g) and (h), pursuant to Iowa law	11
Conclusion	12

TABLE OF AUTHORITIES

Cases: Page

Erie R.R. v. Tompkins, 304 U.S. 64 (1938) 7
Ex parte Garland, 4 Wall. (71 U.S.) 333 (1867) .. 10
Hyland v. Fukuda, 580 F.2d 977 (9th Cir. 1978) 8
Iowa Beer and Liquor Control Department v. McBlain, 263 N.W.2d 226 (1977) 12
Jerome v. United States, 318 U.S. 101 (1943) 2, 4, 9
McBoyle v. United States, 283 U.S. 25 (1931) 7
Reconstruction Finance Corp. v. Beaver County, 328 U.S. 204 (1946) 3
State v. Farmer, 234 N.W.2d 89 (1975) 11
United States v. Bass, 404 U.S. 336 (1971) 6, 7
United States v. Benson, 605 F.2d 1093 (9th Cir. 1979) 6
United States v. Bergeman, 592 F.2d 533 (9th Cir. 1979) 5, 8
United States v. Herrell, 588 F.2d 711 (9th Cir. 1978) 8
United States v. Matassini, 565 F.2d 1297 (5th Cir. 1978) 8
United States v. Mostad, 485 F.2d 199 (8th Cir. 1973) 8
United States v. Padia, 584 F.2d 85 (5th Cir. 1978) 8
United States v. Potts, 528 F.2d 883 (9th Cir. 1975) 8
United States v. Stober, 604 F.2d 1274 (10th Cir. 1979) 7

Statutes:

Gun Control Act of 1968, Pub. L. 90-618, 82 Stat. 1213:
Title I—State Firearms Control Assistance:
§ 102:
18 U.S.C. 921(a)(20) 4
18 U.S.C. 922(g) ..... *passim*
18 U.S.C. 922(h) ..... *passim*
18 U.S.C. 927 5

TABLE OF AUTHORITIES—Continued

	Page
Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. 90-351, 82 Stat. 226, amended by Title III, Gun Control Act of 1968, Pub. L. 90-618, 82 Stat. 1236:	
Title IV, 18 U.S.C. 921 *et seq.*	2
Title VII, 18 U.S.C. App. 1201 *et seq.*:	
18 U.S.C. App. 1202(a)(3)	12
18 U.S.C. App. 1202(b)(3)	12
18 U.S.C. App. 1203(2)	10
18 U.S.C. 841	11
21 U.S.C. 844(b)	10
Iowa Code Ann. (West 1979 and Cum. Supp. 1981):	
§ 907.9	11
Miscellaneous:	
H.R. Rep. No. 1577, 90th Cong., 2d Sess. (1968)	3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-1180

G.R. DICKERSON, DIRECTOR, BUREAU OF ALCOHOL, TOBACCO AND FIREARMS,

Petitioner

v.

NEW BANNER INSTITUTE, INC.,

Respondent

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

BRIEF AMICUS CURIAE OF THE NATIONAL RIFLE ASSOCIATION OF AMERICA

STATEMENT

While Amicus agrees with most of the Statement of the Petitioner (Brief of the Petitioner, 2-7), it should be pointed out that Petitioner's references to Respondent's "Iowa conviction" and his "conviction in Iowa" beg the question at issue in the instant case. Indeed, throughout its brief, Petitioner makes constant reference to Respondent's "conviction" as if it is beyond dispute that Respondent has been convicted and that the issue to be faced by this Court is simply what effect should be given to an expunged conviction. As was made clear in the manner in which Amicus posed the Questions Presented, this is not, however, the issue which must be resolved by this Court. Rather, it is for this Court to determine whether Petitioner's characterization of the Iowa proceedings as a conviction is in fact an accurate characterization.

ARGUMENT

I. A STATE'S DETERMINATION OF WHETHER A PERSON HAS BEEN CONVICTED OF A VIOLATION OF THAT STATE'S LAW SHOULD BE FOLLOWED IN DETERMINING WHETHER THAT PERSON HAS BEEN CONVICTED WITHIN THE MEANING OF TITLE I OF THE GUN CONTROL ACT OF 1968, 18 U.S.C. 922(g) and (h).

It is beyond dispute that Congress has the power to make the application of a federal statute depend upon state law. *See, Jerome v. United States*, 318 U.S. 101, 104 (1943). The question in the instant case, therefore, is whether Congress has done so with regard to Title I of the Gun Control Act of 1968 (Title 18 U.S.C. 921 *et seq.*)[1]

As this Court stated in *Jerome*, the standard by which to determine whether Congress intended to make the application of a federal statute depend upon state law is whether there is a "plain indication" of such an intent. 318 U.S. at 104. If such an indication is absent, courts "must generally assume . . . that Congress . . . is not making the application of the federal act dependent on state law." 318 U.S. at 104. Such a plain indication can, however, be found throughout Title I of the Gun Control Act and its legislative history thereby demonstrating that Congress intended that 18 U.S.C. 922(g) and (h) be dependent upon state law.

Indeed, one need only to turn to the name Congress assigned to Title I of the Gun Control Act—"State Firearms Control Assistance"—to see that Title I of the Act was very much concerned with state law. As the House Report on H.R. 17735 clearly states, the purpose of the law was "to assist the States effectively to regulate fire-

---

[1] Amicus' arguments will be addressed solely to Title I of the Gun Control Act of 1968, Pub. L. 90-618, 82 Stat. 1213, which amended and reenacted Title IV of the Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. 90-351, 82 Stat. 226.

arms traffic within their borders." H.R. Rep. No. 1577, 90th Cong., 2d Sess., 1968 U.S. Code Cong. and Adm. News at 4411. This was done "so that state and local authorities may better exercise the controls they deem desirable over the acquisition and possession" of firearms. *Id.* at 4418.[2] Given that purpose, it would be anomalous to conclude that Congress did not intend for 18 U.S.C. 922(g) and (h) to depend on state law since the very purpose of the Act was to aid the states in enforcing their own laws. Thus, Title I of the Gun Control Act is a prime example of where "the Congressional purpose can best be accomplished by application of settled state rules . . . ." *Reconstruction Finance Corp. v. Beaver County*, 328 U.S. 204, 210 (1946) since allowing a federal interpretation of state law would not only fail to achieve the purposes of the legislation, but would, in many instances, actually *thwart* the purpose of that Title. For example, in the instant case, Respondent applied for, and was issued, by the State Law Enforcement Division in South Carolina, a state pistol dealer's license. (Respondent's Additional Appendices, at 165a). Yet because of the federal determination that he had been convicted within the meaning of Title I of the Gun Control Act, Respondent was unable to obtain a federal dealer's license. Consequently, even though the State of South Carolina is satisfied that Respondent is qualified to be licensed and even though goals of South Carolina's "gun control" laws have been achieved[3] (the express purpose of Title I of the Gun Control Act) that very federal law, if interpreted as contended by Peti-

---

[2] Attorney General Ramsey Clark wrote to the Speaker of the House that "this bill will give states and local communities the capacity and the incentive to enforce effectively their own gun control laws." 1968 U.S. Code Cong. and Adm. News at 4425.

[3] Thus, it is inaccurate to state that Respondent "is precisely the sort of person Congress intended to disable from carrying or dealing in firearms." Brief of the Petitioner at 30. In fact, because South Carolina is not concerned with Respondent's record, Congress would have been equally unconcerned.

tioner, prohibits Respondent from exercising his rights under the South Carolina laws. This surely is not the object sought to be achieved by Congress and can only be remedied by deferring to the state's interpretation of its own law.

In addition to the clearly expressed purpose of Congress in enacting Title I of the Gun Control Act, it is apparent from 18 U.S.C. 921(a)(20), which defines the term "crime punishable by imprisonment for a term exceeding one year" and uses the words "classified by the laws of the State" that Congress was concerned with, and intended to make 18 U.S.C. 922(g) and (h) dependent upon, the manner in which the states viewed their own laws. Again, it would be anomalous to conclude that Congress expressly turned to state law to determine the class of convictions which excluded a person from the disabilities imposed by federal law but, as to that class of convictions which imposed such disabilities, intended that state law woud not be determinative of whether such convictions were in fact convictions.[4] Indeed, to do so would rob the states, wherein, traditionally, "the administration of criminal justice under our federal system has rested . . . ." (*Jerome* at 105), of their ability to determine who shall suffer the penalties incurred by engaging in criminal activity and would thus strike at the very heart of the concept of state sovereignty since the *sine qua non* of sovereignty is the power to punish for

---

[4] Petitioner, however, sees "no inconsistency" in what it views as "Congress' refusal to be bound by subsequent state actions, such as expunctions, that . . . vary widely from state to state, are not subject to minimum federal standards, and do not provide sufficient assurance that the person in question no longer poses an unacceptable risk of dangerousness." Brief of the Petitioner at 28. While it is true that Congress need not be bound by subsequent state actions, it is also true that it can, if it so choses, be so bound. The fact that such actions vary widely from state to state and are not subject to minimum federal standards is not an argument that Congress did not intend to be bound by such actions when viewed in light of the

violations of the criminal laws.[5] (*See* Judge Takasugi's well-reasoned dissenting opinion in *United States v. Bergemann*, 592 F.2d 533 (9th Cir. 1979), at p. 541.)

To resolve any lingering doubt that Congress intended that a state's determination of its own law should be controlling, Congress included within Title I of the Gun Control Act a provision regarding the effect of that Title on state law. 18 U.S.C. 927 states:

> No provision of this chapter shall be construed as indicating an intent on the part of the Congress to occupy the field in which such provision operates *to the exclusion of the law of any State on the same subject matter*, unless there is a direct and positive conflict between such provision and the law of the State so that the two cannot be reconciled or consistently stand together. (emphasis added)

Clearly, were a state's interpretation of its own law not determinative of whether a person had been convicted within the meaning of Title I of the Gun Control Act, 18 U.S.C. 922(g) and (h) would be operating "to the exclusion" of the law of the state on the subject of con-

---

purposes of Title I of the Gun Control Act. Moreover, it is a slap in the face to the whole concept of state rehabilitative programs, such as expunctions or dismissals prior to entry of judgment, to suggest that in those situations "sufficient assurances" that the defendant "no longer poses an unacceptable risk of dangerousnesa" do not exist. On the contrary, it can fairly be assumed that the states have, in authorizing expunctions and dismissals, taken account of the risks posed by allowing certain defendants to take advantage of the rehabilitative policies of such statutes.

[5] Petitioner is incorrect when it states that an expunged conviction does not signify that a person "poses no greater threat to the community than any other person." (Brief of the Petitioner at 8). In fact, the purpose of an expunction is to allow a person to once again enjoy the rights of citizenship because the state has determined that he no longer poses a greater threat to the community than any other person. To view an expunction otherwise is to give no effect to a state's policy of promoting the rehabilitation of its citizens.

victions. Equally clearly, the law of the state *can*, if a state's interpretation of its own law is determinative of whether a person has been convicted, be easily reconciled with federal law so that the two can consistently stand together.[6]

That Congress did not intend a federal interpretation of state law to displace a state's interpretation of its own law rests also on the policy that "unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance . . . ." *United States v. Bass*, 404 U.S. 336, 349 (1971). As this Court observed, "this congressional policy is rooted in the same concepts of American federalism that have provided the basis for judge-made doctrines." 404 U.S. at 349.

As evidence that Congress had not faced "the critical matters involved", this Court noted the fact that the issues of federal-state relationships and the overextension of limited federal police resources " 'are not even discussed in the legislative history' ". 404 U.S. at 350. Likewise, with regard to Title I of the Gun Control Act, there is not even a hint, in either the Act or its legislative history, that the federal-state balance was to be

---

[6] While Petitioner has not raised the issue of uneven application of federal law if a state's interpretation of its own law were to be followed in determining whether a person was convicted within the meaning of Title I of the Gun Control Act, it should be pointed out that "there can be no uniformity since, according to the very language of § 922(h)(1), a person is within the scope of the statute only when convicted 'in any court of a crime punishable by imprisonment for a term exceeding one year.' " *United States v. Benson*, 605 F.2d 1093, 1096 (9th Cir. 1979) (Ely, J., concurring). Thus, when added to the fact that the purpose of Title I of the Gun Control Act was to aid the states in enforcing their own "gun control" laws and it was certainly known to Congress that such laws varied widely, it is apparent that uniformity was not sought by Congress. Moreover, if Congress truly intended national uniformity, it could have described the particular crimes which would subject a person to federal firearms disabilities rather than relying on state law.

tipped. To the contrary, the evidence is overwhelming that Congress intended to retain the balance by involving the federal government in the fight against violent crime only to the degree that the states were incapable of doing so, i.e. controlling interstate activities so that the states could effectively administer and enforce their own laws.

In addition to the clearly expressed congressional intent and the congressional desire to limit the federal goverment's involvement to matters of purely federal concern, there are two constitutional bases for concluding that a state's interpretation of its own law is determinative of whether a person has been convicted within the meaning of Title I of the Gun Control Act. The first concerns the due process requirement that a person have adequate notice "of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear." *McBoyle v. United States*, 283 U.S. 25, 27 (1931). As in the instant case, however, wherein a state's interpretation of its own law results in a person having no conviction, and thus not being subject to state restrictions on the possession of firearms, and a federal interpretation of that same law has the opposite effect, "the notice problem of that law [i.e. the federal law] may be quite real." *United States v. Bass*, 404 U.S. 336, 346, n. 15 (1971).

This differing interpretation of state law also gives rise to a violation of the constitutional requirement of equal protection of the laws analogous to that faced by this Court in *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938) which this Court resolved by holding that federal courts were to be bound by a state's interpretation of its own law. As the Tenth Circuit sitting *en banc* has correctly observed, it is entirely possible that different federal courts could interpret state law differently so that, depending on venue, "the defendant can be guilty in one jurisdiction but not in another." *United States v. Stober*,

604 F.2d 1274, 1276 (1979).[7] Moreover, this Court, which would have to resolve such conflicts, would ultimately bear the responsibility of interpreting a state's law even if there were a definitive decision by the highest court of the state, a burden which could be avoided if a state's own interpretation of its law were to be fol-

---

[7] *Stober* unequivocably concluded that "the state's determination as to whether the proceedings constituted a 'conviction' in its courts should have been followed by the federal trial court in this prosecution." 604 F.2d at 1276. In doing so it joined the Fifth Circuit which had earlier held that "[w]e see no reason, in either the language or legislative history of Title IV [which Title I of the Gun Control Act amended and reenacted], to doubt that Congress adopted the states' own definitions of conviction, including the effects of a pardon thereon." *United States v. Matassini*, 565 F.2d 1297, 1310, n.26 (5th Cir. 1978). Subsequently, in *United States v. Padia*, 584 F.2d 85 (5th Cir. 1978) another panel of the Fifth Circuit, in an extremely brief opinion which did not take into consideration any of the arguments presented in *Matassini* and without the slightest mention of *Matassini*, held that the manner in which a state court chose " 'to deal with a party subsequent to his conviction is simply not of controlling importance.' " 584 F.2d at 86. In support of that conclusion, the court cited a number of immigration cases. Such cases are, however, distinguishable since the Constitution has expressly granted to Congress plenary power over immigration and naturalization, a corollary of which is the need for uniform federal law. As explained, *supra*, the purposes of Title I of the Gun Control Act are quite different, thereby vitiating a need for uniform federal law. *Cf. United States v. Mostad*, 485 F.2d 199 (8th Cir. 1973). The status of the law in the Ninth Circuit is not as clear. In *United States v. Potts*, 528 F.2d 883 (9th Cir. 1975), the Ninth Circuit, sitting *en banc*, affirmed the conviction of a defendant charged with a violation of 18 U.S.C. App. 1202(a)(1). The opinion of the court, written by Judge Koelsch, held that the issue of whether a state's interpretation of its own law or a federal interpretation should control did not need to be reached since the result would be the same which ever law was followed because of the particular statute involved. A concurrence by Judge Sneed held, however, that a federal interpretation would be controlling. Subsequently, panels of that court have apparently gone both ways: *United States v. Herrell*, 588 F.2d 711 (9th Cir. 1978); *Hyland v. Fukuda*, 580 F.2d 977 (9th Cir. 1978); and *United States v. Bergemann*, 592 F.2d 533 (9th Cir. 1979).

lowed when determining whether a person was convicted within the meaning of Title I of the Gun Control Act.

Notwithstanding the above arguments, Petitioner takes the position that, at least as to expunctions, Congress did not intend for a state's interpretation of its own law to be followed. In support of its argument, Petitioner points to the fact that "Congress precluded the Secretary [of the Treasury] from granting relief [from disabilities] to persons convicted of crimes involving firearms" and concludes that "*it is unlikely* that Congress intended to exempt expunged state convictions, no matter what the nature of the offense." (emphasis added) Brief of the Petitioner at 20. Added to that, Petitioner notes, is the fact that because the Secretary must make a specific determination regarding the applicant's suitability to possess firearms, "*it seems unlikely* that Congress intended to credit state expunctions that may have been made without any consideration of problems concerning fireadms." (emphasis added) *Ibid.* Finally, Petitioner suggests that if state expunctions automatically removed federal firearms disabilities, a person subject to such disabilities could circumvent the statutory relief procedure by applying to the state for expunction." *Ibid.* Taken together these arguments imply that the states act carelessly, irrationally, and without good judgment in determining whose convictions should be expunged and that therefore the states are not to be trusted to make such determinations. Aside from the fact that it should not be lightly assumed that Congress would take such a condecending, pious attitude toward the states, such a view would significantly alter the balance of federal-state relations in an area, i.e. criminal law, which has traditionally rested with the states. *See, Jerome* at 105. Alteration of that balance should not be undertaken by the federal courts based only upon what, in Petitioner's words, it "seems unlikely", Congress intended, particularly when the express purpose of Title I of the Gun Control Act is

to aid the states in their law enforcement activities, not supplant them.[8]

In an attempt to demonstrate in another context that Congress did not intend to give effect to state expunctions, Petitioner turns to 21 U.S.C. 844(b), which provides that a first offender found guilty of simple possession of a controlled substance may be placed on probation without the entry of judgment and that, upon the successful completion of probation, "the court shall discharge [the offender] and dismiss the proceedings against him" (21 U.S.C. 844(b)(1)) and further provides that "[s]uch discharge or dismissal shall not be deemed a conviction for purposes of disqualifications or disabilities imposed by law upon conviction of a crime." (21 U.S.C. 844(b)(1)). Petitioner contends the latter provision would be "superfluous if Congress had believed that expunction automatically removed the 'disqualifications and disabilities' resulting from conviction." Brief for the Petitioner at 23. In the first place, this statute is not concerned with convictions; thus, it is certainly not concerned with expunction of convictions. Consequently, Congress could not have even considered the question of whether the latter provision was superfluous with regard to expunged convictions. Clearly, however, even if in fact the latter provision was superfluous, Congress foresaw that there might be an attempt to construe charges dismissed pursuant to 21 U.S.C. 844(b) as a conviction and wished,

---

[8] That 18 U.S.C. App. 1203(2) expressly provides that certain pardons will remove federal firearms disabilities does not alter this conclusion since a pardon is effectively a forgiveness which "removes the penalties and disabilities, and restores . . . all . . . civil rights . . . ." (*Ex Parte Garland*, 4 Wall. (71 U.S.) 333, 380 (1867)) whereas an expunction does away with the conviction itself. Thus, because a person might be eligible for a pardon, but not be able to obtain an expunction, a process was needed whereby he could regain his firearms rights after having received only a pardon.

out of an abundance of caution, to make plain that such was not the case.[9]

II. RESPONDENT WAS NOT CONVICTED, WITHIN THE MEANING OF TITLE I OF THE GUN CONTROL ACT OF 1968, 18 U.S.C. 922(g) AND (h), PURSUANT TO IOWA LAW.

Having shown that a state's determination of whether a person is convicted within the meaning of Title I of the Gun Control Act should be followed, it is clear that under Iowa law Respondent is not subject to the disabilities imposed by that Act.

Iowa Code § 789A.1 (1975) (current version at Iowa Code Ann. § 907.9 (West 1979 and Cum. Supp. 1981)) provided that the "trial court may, upon a plea of guilty . . . upon which a *judgment of conviction may* be rendered . . . ." (emphasis added) defer judgment and place the defendant on probation. From the plain words of the statute, it is apparent that no judgment of conviction has been entered at the time probation is started. Thus, under Iowa law, there has been no conviction if a defendant merely enters a plea of guilty.[10]

Recognizing that a plea of guilty is not the equivalent of a conviction under Iowa law, the Iowa Supreme Court held that "[i]f a defendant is discharged from probation under § 789A.6, no conviction occurs in the strict legal sense because no adjudication of guilt is made." *State v. Farmer*, 234 N.W. 2d 89 (1975). It subsequently re-

---

[9] Petitioner's discussion of 18 U.S.C. 841(i)(1) (Brief of the Petitioner, at 23) suffers from the same weaknesses as its discussion of Title I of the Gun Control Act. That is, no express provision excepting persons with expunged convictions was included in that statute since Congress recognized that expunged convictions were not convictions, thus making such a provision unnecessary. Given, however, Petitioner's unflagging efforts to see convictions where there are none, it is apparent that in the future, to avoid needless litigation, Congress may have to begin to include such express provisions.

iterated that holding in *Iowa Beer and Liquor Control Department v. McBlain*, 263 N.W. 2d 226 (1977) observing that "[o]nly if [defendant's] probation is revoked will he be convicted . . . ." 263 N.W. 2d at 227. Thus, no amount of reference to Respondent's "conviction" can change the fact that under Iowa law, as clearly construed by that state's highest court, Respondent was not convicted of a violation of that state's laws.

CONCLUSION

Since Congress intended that a state's determination of its own law be followed in determining whether a person has been convicted within the meaning of Title I of the Gun Control Act of 1968, and Iowa law makes it clear that Respondent was not convicted, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

DAVID T. HARDY *
RICHARD E. GARDINER

Office of the General Counsel
NATIONAL RIFLE ASSOCIATION
1600 Rhode Island Avenue, N.W.
Washington, D.C. 20036
(202) 828-6348

* Counsel of Record

September 3, 1982

---

[10] Congress was also concerned that, where possible, a formal adjudication be made before a person is subjected to federal firearms disabilities. Thus, 18 U.S.C. 922(g)(4) and (h)(4) expressly require that a person be "*adjudicated* as a mental defective" (emphasis added). Likewise, 18 U.S.C. App. 1202(a)(3) and (b)(3) expressly require that a person be "*adjudged* by a court" (emphasis added) of being mentally incompetent. Absent such a formal judgment it can never be clear whether a person is actually guilty of an offense since it is the function of the court to determine the *legal* sufficiency of a verdict or plea of guilty.

Supplemental Brief

MOTION FILED
DEC 16

No. 81-1180

In the Supreme Court of the United States

OCTOBER TERM, 1982

G.R. DICKERSON, DIRECTOR, BUREAU OF ALCOHOL, TOBACCO AND FIREARMS, PETITIONER

v.

NEW BANNER INSTITUTE, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MOTION FOR LEAVE TO FILE SUPPLEMENTAL MEMORANDUM AND SUPPLEMENTAL MEMORANDUM FOR THE PETITIONER

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 81-1180

G.R. DICKERSON, DIRECTOR, BUREAU OF ALCOHOL, TOBACCO AND FIREARMS, PETITIONER

v.

NEW BANNER INSTITUTE, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MOTION FOR LEAVE TO FILE SUPPLEMENTAL MEMORANDUM AND SUPPLEMENTAL MEMORANDUM FOR THE PETITIONER

Pursuant to Rules 35.5 and 35.6 of the Rules of this Court, the Solicitor General, on behalf of petitioner, moves for leave to file the attached supplemental memorandum.

This case concerns the question whether firearms disabilities imposed by 18 U.S.C. 922(g) and (h) apply to a person who was convicted of a state offense punishable by imprisonment for a term exceeding one year but whose conviction was expunged under state law following successful probation. After the oral argument in this case, the Fifth Circuit's recent decision in *United States* v. *Gray,* No. 82-1246 (Nov. 12, 1982), came to our attention. In that case, the court held that the firearms disabilities imposed by a similar provision of federal law, 18 U.S.C. App. 1202(a)(1), apply to a person whose qualifying state conviction was

expunged under state law. The attached supplemental memorandum is submitted to inform the Court of that decision.

Respectfully submitted.

REX E. LEE
Solicitor General

DECEMBER 1982

In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 81-1180

G.R. DICKERSON, DIRECTOR, BUREAU OF ALCOHOL, TOBACCO AND FIREARMS, PETITIONER

v.

NEW BANNER INSTITUTE, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE PETITIONER

Pursuant to Rule 35.5 of the Rules of this Court, the Solicitor General, on behalf of petitioner, files this supplemental memorandum to inform the Court of the decision of the United States Court of Appeals for the Fifth Circuit in *United States* v. *Gray,* No. 82-1246 (Nov. 12, 1982). In that case, the defendant had previously been convicted of a felony under Texas law and had been placed on probation. Upon successfully completing the period of probation, his conviction had been set aside under a provision of Texas law (Tex. Code Crim. Proc. Ann. art. 42.12, § 7 (Vernon 1981)) providing that the court

> shall dismiss the accusation, complaint, information, or indictment against such defendant, who shall thereafter be released from all penalties and disabilities resulting from the offense or crime of which he has been convicted or to which he has pleaded guilty,

> except that proof of his said conviction or plea of guilty shall be made known to the court should the defendant again be convicted of any criminal offense.

The defendant was later convicted under 18 U.S.C. App. 1202(a)(1), which makes illegal the possession of a firearm by "[a]ny person who * * * has been convicted by a court of the United States or of a State or any political subdivision thereof of a felony * * *."

The court of appeals affirmed the conviction. The court followed (slip op. 815) decisions of the Eighth and Ninth Circuits holding that the expunction of a conviction under state law does not automatically remove federal firearms disabilities (see our principal brief at 6 n.3) and disagreed with the court of appeals' decision in the present case. The *Gray* court also distinguished (slip op. 815) its own prior decisions and those of other circuits holding that a conviction set aside under the Federal Youth Corrections Act may not provide the predicate for a prosecution under 18 U.S.C. App. 1201. The court noted (slip op. 815-816) that 18 U.S.C. App. 1203 contains specific exemptions from the disabilities imposed by 18 U.S.C. App. 1202 but that the defendant in that case did not qualify for those exemptions. The court reasoned (slip op. 816; emphasis in original):

> Sections 1202 and 1203 constitute federal screening provisions, keyed to the *fact* of felony conviction, designed to remove from the gun-possessing segment of our citizenry those validly so convicted. As such, they stand independent of state law, except to the extent that they recognize it.

The decision in *Gray* is also significant because, as the same court explained in *United States* v. *Lehmann*, 613 F.2d 130, 135 (5th Cir. 1980), "[u]nder Texas law, when a Texas court suspends a sentence and grants probation, the conviction is not considered final." In *Lehmann*, the court

rejected the argument that a person on probation for a Texas offense is not a person who "has been convicted" within the meaning of the federal firearms laws. See also *United States* v. *Padia*, 584 F.2d 85 (5th Cir. 1978). The *Lehmann* court found that this technicality of state law had no bearing upon the application of those federal statutes. Thus, although the issue was not discussed in *Gray*, the court implicitly held that the firearms disabilities imposed by 18 U.S.C. App. 1202(a)(1) apply even though the prior state proceedings upon which those disabilities were based did not result in a final conviction under state law.

We believe that *Gray* was correctly decided and that its reasoning should be followed in this case. For the convenience of the Court, we have lodged ten copies of that decision with the Clerk of this Court.

For the foregoing reasons and the additional reasons set forth in our principal brief and reply brief and during oral argument, it is respectfully submitted that the judgment of the court of appeals should be reversed.

REX E. LEE
Solicitor General

DECEMBER 1982

DOJ-1982-12

Docket Sheet

NO. 81-1180-CFX	TITLE	G.R. DICKERSON, Director, Bureau of Alcohol, Tobacco and Firearms, Petitioner v. New Banner Institute, Inc.

DOCKETED	COURT
Dec. 22, 1981	United States Court of Appeals for the Fourth Circuit

DATE	PROCEEDINGS AND ORDERS
	Counsel for Petitioner: Solicitor General
	Counsel for Respondent:
Nov. 6, 1981	Application for an extension of time to file petition for writ of certiorari and order granting same until December 23, 1981 by Burger, CJ, Nov. 9, 1981.
Dec. 22, 1981	Petition for writ of certiorari filed. (Record filed).
Jan. 18, 1982	Order extending time to file a response to the petition until Feb. 19, 1982.
Feb. 22, 1982	Brief for the respondent in opposition filed.
Feb. 22, 1982	Appendix to brief in opposition filed.
Feb. 24, 1982	DISTRIBUTED. 3-19.
Mar. 11, 1982	Reply memorandum for the petitioners filed. (D).
Mar. 22, 1982	Petition GRANTED.

Apr. 1, 1982	Motion of the parties to dispense with printing the joint appendix filed.
Apr. 13, 1982	DISTRIBUTED. 4-16. (Above motion).
Apr. 19, 1982	The motion of the parties to dispense with printing the joint appendix is GRANTED.
May 6, 1982	Order extending time to file the petitioner's brief on the merits until June 5, 1982.
June 7, 1982	Order further extending time to file the petitioner's brief on the merits until June 19, 1982.
June 21, 1982	Brief for the petitioner filed.
July 20, 1982	Order extending time to file the respondent's brief on the merits until Aug. 24, 1982.
Aug. 20, 1982	Order further extending time to file the respondent's brief on the merits until September 3, 1982.
Sept. 3, 1982	Brief for the respondent filed.
Sept. 3, 1982	Brief, amicus curiae, of The National Rifle Association of America filed.
Sept. 15, 1982	CIRCULATED.
Sept. 17, 1982	Motion of National Rifle Association of America for leave to participate in oral argument as amicus curiae filed.
	(Over)

81-1180

Title

No.

DATE	PROCEEDINGS AND ORDERS
Oct. 4, 1982	The motion of National Association of America for leave to participate in oral argument as amicus curiae is DENIED.
Nov. 19, 1982	Reply brief for the petitioner filed. (D).
Nov. 29, 1982	ARGUED.
Dec. 16, 1982	Motion for Leave to File Supplemental Memorandum and Supplemental Memorandum for the Petitioner